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VIA ELECTRONIC FILING

October 3, 2003

EX PARTE

Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Presentation – CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On October 2, 2003, the attached EarthLink Petition for Reconsideration, filed in the above-referenced dockets on the same day, was sent by this office via email to the following Commission staff: Christopher Libertelli; Matthew Brill; Daniel Gonzalez; Jessica Rosenworcel; Lisa Zaina; William Maher; Carol Mattey; Michelle Carey; Thomas Navin; John Rogovin; and Brent Olson.

One copy of this letter is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to call me if you have any questions.

Respectfully submitted,

/s/

Mark J. O'Connor
Counsel for EarthLink, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

PETITION FOR RECONSIDERATION OF EARTHLINK, INC.

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Dated: October 2, 2003

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SUMMARY

EarthLink respectfully urges the Commission to reconsider its decision to eliminate the line sharing UNE. On both the merits and the procedures, errors were made that, when corrected, compel the Commission to reverse course.

On the *merits*, the line sharing decision is fundamentally inconsistent with the impairment analysis set out in the Order. The decision on line sharing affirmatively harms the Section 706 goals for broadband deployment by undermining facilities-based CLECs providing wholesale ADSL alternatives in the residential mass market, and contradicts the Commission's approach to copper loops under the rules applicable for the ILEC legacy network. Further, the line sharing decision misapplies the impairment standard by assuming that CLECs must bundle all conceivable services to overcome the ILECs' inherent legacy cost advantages. The line sharing decision also contradicts the Order's substantive response to the *USTA* remand issues, and wrongly assumes that the *USTA* Court had foreclosed the Commission's options on line sharing. Finally, the Commission makes errors of fact and law regarding the impact of line splitting on the line sharing impairment analysis. EarthLink urges the Commission to reinstate the line sharing UNE or, in the alternative, reinstate and provide the states with the authority to conduct a granular analysis on line splitting use and availability.

EarthLink also urges the Commission to provide a transition mechanism on reconsideration that will better address the consumer disruption and public interest issues likely to result from the elimination of the line sharing UNE. The Commission should halt the transition rate increases for line sharing until such time as the industry has developed and implemented an intramodal "hot cut" mechanism to transfer end-user DSL connections from one carrier to another. Without this mechanism, the Commission's transition will likely strand

hundreds of thousands of consumers without DSL service when and if the data CLECs exit the market.

On *procedure*, EarthLink urges the Commission to reconsider the line sharing decision because it was plagued with irregularities that make it glaringly illegal. The Commission conducted a post-February 20, 2003, private, invitation-only rule making in violation of the open rule making obligations of Section 553 of the APA. Further, the Sunshine Act was violated when the Commission voted on a "roughly conceived outline" and had no final rules and decision at the February 20, 2003, open meeting. The volume of post-decisional *ex parte* presentations during the "sunshine period" also demonstrates abuse of the FCC's *ex parte* rules. Finally, the APA and the Communications Act were violated because: (a) the Commission failed to consider the line sharing UNE on its merits; and (b) the Commission failed to explain the basis for its compromise in the Order, thereby frustrating the statutory role of reviewing appellate courts.

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PETITION FOR RECONSIDERATION OF EARTHLINK, INC.

EarthLink, Inc. ("EarthLink"), by its attorneys and pursuant to Section 1.429(a) of the Commission's rules,[1] files this Petition for Reconsideration of the Report and Order and Order on Remand ("Order") in the above-referenced proceedings.[2] EarthLink urges the Commission to reconsider the elimination of line sharing as an unbundled network element ("UNE"). EarthLink provides broadband Internet access to approximately one million end user subscribers, adding more broadband customers each day, with most accessing the Internet using DSL technology over the high frequency portion of the local loop ("HFPL"). The elimination of the line sharing UNE is almost certain to eliminate all but incumbent local exchange carriers ("ILECs") as wholesale providers of broadband transport for Internet access. This result is wholly inconsistent with the Commission's objective to foster broadband deployment and competition and the statutory obligations of Section 706 of the Communications Act ("Act").

[1] 47 C.F.R. §1.429(a).
[2] Report and Order and Order On Remand and Further Notice of Proposed Rulemaking, FCC 02-36, 68 Fed. Reg. 52276 (Oct. 2, 2003) ("Order").

DISCUSSION

I. THE LINE SHARING IMPAIRMENT ANALYSIS IS ARBITRARY AND INCONSISTENT WITH REGULATORY AND JUDICIAL PRECEDENT

A. The FCC's Decision to Eliminate the Line Sharing UNE is Arbitrary and Internally Inconsistent

The Commission's review of the merits of the line sharing UNE is flawed and should be corrected to be consistent with the Act and with the goal to enhance broadband connectivity. Specifically, the decision to eliminate UNE access to the HFPL through line sharing is: contrary to the goals of Section 706 of the Telecommunications Act of 1996 to promote broadband deployment; based on unachievable revenue projections that are neither supportable nor supported in the record; contrary to the impairment analysis and methodology required in the Act and set forth in the Order; internally inconsistent with the Commission's treatment of such factors as Section 271 compliance; based on a view of line splitting that is not supported by the record and contrary to the potential of line splitting; and based on a mistaken interpretation of the relationship between line sharing rates and cost allocation requirements.

1. Elimination of Line Sharing Contradicts the Order's Approach To Broadband under Section 706 of the Act and Relies on Other Factors Rejected in the Order

The Order establishes a policy approach of bifurcating UNE obligations between the ILEC "legacy" network (e.g., copper loops) and the ILEC "new" network (e.g., fiber-to-the home).[3] The Commission explains that its Section 706 obligation to ensure deployment of advanced telecommunications capability warrants different treatment of existing loop plant and

[3] The Commission notes, "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.... At the same time, continued unbundling for the network elements provided over current facilities appears to be necessary in many areas under section 251 of the Act, especially with respect to mass market customers." Order, ¶ 3.

new loop plant.[4] The Order asserts that, consistent with the "at a minimum" statutory language, implementation of Section 706 broadband deployment goals supports this bifurcated approach.[5]

The Order, however, fails to follow through on that approach in the line sharing decision. As the Order's policy explains, the legacy rules should continue to apply to the copper loop and there is no basis, or explanation in the Order, to conclude that the HFPL (copper loop) should somehow be treated differently. Indeed, since the Commission decided to weigh broadband deployment goals so heavily, the case is even stronger for maintaining the line sharing UNE. Line sharing, affirmatively promotes the Section 706 mandate by allowing competitive local exchange carriers ("CLECs") to lease the HFPL of existing copper loop, to deploy the CLECs' own DSLAM facilities, and to offer competitive DSL services on a wholesale basis to Internet Service Providers ("ISPs"). This alternative to the ILEC wholesale DSL offerings, in turn, allows ISPs to offer competitive broadband information services to consumers,[6] including at speeds and technical characteristics that are not offered by the ILECs. [7]

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[4] "Therefore our obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because the incumbent LEC has already made the most significant infrastructure investment, i.e., deployed the loop to the customer's premises, we seek, through our unbundling rules to encourage both intramodal and intermodal carriers (in addition to incumbent LECs) to enter the broadband mass market and make infrastructure investments in equipment. In addition, we seek to promote the deployment of equipment that can unleash the full potential of the embedded copper loop plant so that consumers can experience enhanced broadband capabilities before the mass deployment of fiber loops." Order, ¶244.

[5] Order, ¶¶ 172-177.

[6] Wholesale DSL provisioning to ISPs will "stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶20 (1999).

[7] According to the FCC's most recent data, there are 6.5 million ADSL lines in service in the U.S., growing at an annual rate of 27 percent and 95.1 percent of those lines are provided by ILECs, with the BOCs alone providing 86 percent. High Speed Services for Internet Access:

While the Order properly recognizes the need to maintain UNE access to the legacy local loop,[8] the Order provides no basis to deny access to the HFPL of the legacy local loop. To the contrary, the Commission acknowledges that there are no alternatives to the local loop and that the competitive provision of DSL transmission services has fostered both facilities-based telecommunications competition as well as information services competition.[9] Only time will tell whether declining to regulate "new" fiber ILEC networks spurs investment as the Commission hopes; however, eliminating access to legacy facilities that provide broadband services today is directly contrary to stated broadband goals.

In the same way, the line sharing decision relies on other factors that are rejected in other portions of the Order, effectively establishing an incoherent line sharing unbundling standard. For example, according to the Commission, "requesting carriers are generally impaired on a national basis without access to an incumbent LEC's local loops*, whether they seek to provide narrowband or broadband services*, or both."[10] For purposes of the copper loop, the Commission's impairment analysis is independent of the type of services the CLEC wishes to offer. For reasons that are not explained, however, the line sharing impairment analysis of the same copper loop assumes the CLEC will provide a bundled package of voice, data, and video services.[11] The application of these inconsistent standards leads to absurd results – UNE access to the whole copper loop is permitted under one "impairment" test to provide either voice or data

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Status as of December 31, 2002, FCC Wireline Competition Bureau at Tables 1, 5 (rel. June 10, 2003) ("High Speed Services Report").

[8] Order, ¶ 248.

[9] Order, ¶233.

[10] Order, ¶248 (emphasis added). *See also* Order, ¶ 250 (unbundling ensures "that requesting carriers have access to the copper transmission facilities they need in order *to provide narrowband or broadband services (or both) to customers served by copper local loops*." (emphasis added)).

[11] Order, ¶261.

only, but then later, under a different unbundling standard, the HFPL of the same copper loop cannot meet "impairment" standard.

Nor does the Order explain how the approach taken to line sharing is consistent with the ILECs' Section 251(c) duty to provide UNE access to "*any* requesting telecommunications carrier."[12] The statute, on its face, would allow the carrier *of any telecommunications service* to obtain access, and so would forbid the Commission's choice to evaluate line sharing impairment only for the highly hypothetical CLEC with "increased revenue opportunities"[13] from a bundled broadband data, voice and video services. The Commission simply has no authority to require CLECs to offer a bundled package of services in order to compete in the mass market broadband transport business.[14]

Further, while the Order concludes that the need for a line sharing UNE is mitigated by the competitive conditions established by the approval of 43 Section 271 applications,[15] other parts of the Order refuse to give similar weight to the Section 271 grants. For example, the Commission rejects ILEC proposals to use compliance with Section 271 performance metrics as a test for removal of unbundling requirements,[16] and refuses to rely on the ILECs' hot cut performance in the Section 271 process as probative of the hot cut performance required for removal of the switching UNE.[17]

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[12] 47 U.S.C. § 251(c)(3) (emphasis added).
[13] Order, ¶ 258.
[14] Indeed, once again, the Order is contradictory: on the one hand, the impairment analysis is not dependent on a particular CLEC business model or entry strategy (Order, ¶ 115), but the line sharing portion of the Order asserts that costs of the whole loop would be offset by revenues assuming the CLEC adopts an all-in-one bundle business strategy (Order, ¶ 258).
[15] Order, ¶259.
[16] Order, ¶342.
[17] Order, ¶469, n. 1435 ("Moreover, contrary to their contentions, the Commission's prior finding in section 271 orders do not support a finding here that competitive carriers would not be impaired if they were required to rely on the hot cut process to serve all mass market

Finally, and in the alternative, the Commission should consider a "granularity" analysis for line sharing that would more appropriately gauge the degree to which line splitting can be viewed as a feasible alternative to line sharing. Indeed, the Order cites no evidence of actual implementation success of line splitting on a national level. On the one hand, despite a finding of national impairment, the Order allows the states to rebut such a finding with regard to many local access facilities – dark fiber loops, DS3 loops, DS1 loops and local switching – where it was not possible for the Commission to engage in the necessary granular analysis.[18] This same "granular" approach, however, is needed for line sharing. Moreover, given the possibility that the elimination of line sharing could have a particularly devastating impact on residential consumers and small business customers,[19] the Commission should at the very least delegate to the states the authority to undertake a more granular analysis of the implementation and availability of line splitting, consistent with the *USTA* decision and the Order.

2. The Commission Fails to Balance the Costs and Benefits of Line Sharing

The line sharing decision is based on a faulty factual premise that distorts the analysis of the costs and benefits of line sharing; when corrected, it is clear that the line sharing UNE should be reinstated. Specifically, the Order assumes that the costs of the entire loop do not impair the

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customers."). Significantly, the Commission also finds that the unbundling requirements of Section 271 shall be retained despite the elimination of such requirements for purposes of Section 251. Order, ¶653.

[18] The Commission noted that delegation to the states is appropriate where "the record before us does not contain sufficiently granular information and the states are better positioned to gather and assess the necessary information. A more granular analysis will also benefit small businesses by considering the differing levels of competition in rural and urban markets and the differing needs and resources of carriers serving mass market and small to medium business customers." Order, ¶188.

[19] *See* Letter from Charles Hoffman, President and CEO, Covad Communications and Charles Garry Betty, President and CEO, EarthLink, Inc., to Chairman Michael Powell, FCC, June 12, 2002 (attached to June 13, 2002 *ex parte* letter, CC Docket Nos. 01-338, 96-98, 98-147) ("Covad/EarthLink Letter").

CLEC because the analysis "take[s] into account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (e.g., VoDSL), data, and video services" which provide "increased revenue opportunities" to offset loop costs.[20]

This fact premise is not grounded in the record, nor can it be. Indeed, the Order provides no revenue analysis at all on the hypothetical bundling of CLEC voice, data and video services showing that plausible CLEC revenue streams would justify such a conclusion. Indeed, the Commission's most recent *Video Programming Competition Report* concludes that video over ADSL "remain[s] in the trial stage."[21] Moreover, while Qwest offers video services via VDSL in just four markets, it does so using a hybrid fiber network, not "home run" copper, and the VDSL has a distance limitation of just 4,000 feet from the ILEC central office.[22] The Commission itself, therefore, has acknowledged the speculative and limited nature of video applications using the telephony network, and so could not possibly have used market evidence to examine impairment and "increased revenue opportunities" as the line sharing portion of the Order (¶ 258) asserts.[23] In addition, this premise is irrelevant to the articulated "impairment" standard of the Order, which looks only to revenues "that a competitor can reasonably be expected to gain over the facilities", and such findings are to be based on "*evidence of the*

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[20] Order, ¶ 258.
[21] Id. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd. 26901, ¶ 98 (2003).
[22] "By using existing fiber in the neighborhood, Qwest reaches within 4,000 feet of a customer's location . . .", *found at*, Qwest Choice TV & Online – VDSL Technology," http://www.qwest.com/vdsl/learn/vdsl.html. *See also*, "Video Offerings May be Key to Success of Rural Broadband," Telecommunications Daily, at 4 (Sept. 29, 2003) (ILEC industry official asserts that ILEC video applications are needed to justify fiber-to-the-home investments).
[23] *Compare with*, Order, ¶ 93 ("actual marketplace evidence is the most persuasive and useful kind of evidence" in an impairment analysis), *and*, Order, ¶ 98 (if "there are limitation on the number or types of customers that can be served by a particular technology, we will consider whether an entrant could use this technology profitably to target only those customers that can be served by the alternative technology.") .

revenue opportunities available."[24] The line sharing discussion, by hypothesizing on no more than a thinly conceived and unsupportable "revenue opportunity," has no proper place in the impairment analysis.[25]

The Order also improperly ignores the impact of its decision on the competitive provision of wholesale DSL service to ISPs. Not a single market participant has emerged as a reasonable substitute for ILEC wholesale DSL transmission services other than the CLECs offering DSL through the HFPL. According to the Commission's own statistics, ILECs provide over 95 percent of the ADSL lines in the United States, while CLECs provide slightly more than 4 percent.[26] For various reasons, satellite, terrestrial wireless, power line communications and cable modem providers do not offer practical alternatives for wholesale broadband transmission. While Commission statistics indicate that cable modem providers have a greater share of overall retail broadband services, ISPs by and large do not have access to the cable modem platform. The line sharing decision, however, strains the CLEC s' financial ability to provision a competitive wholesale alternative to the ILECs' ADSL, and thereby directly diminishes wholesale broadband services in the market. The Order fails to balance these effects of the line sharing decision.

The *USTA* decision[27] is also not addressed in a balanced or consistent manner. While the *USTA* decision required the Commission to consider the relevance of broadband competition

[24] Order, ¶ 100 (emphasis added).
[25] Moreover, the Order (¶ 261) incorrectly ascribes the provision of "a broadband-only service to mass market consumers, rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service" as a social cost of line sharing. For a Commission intent on fostering broadband deployment this is hardly a legitimate basis to eliminate line sharing. *See* Order, ¶ 212 ("Broadband deployment is a critical domestic policy objective that transcends the realm of communications.").
[26] High Speed Services Report, at Table 5**.**
[27] USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

from cable and satellite providers when assessing its line sharing rules, [28] the Commission did so. Specifically, the Commission states "we do not find the presence of intermodal alternatives dispositive in our impairment analysis…."[29] The Commission further explains, cable has "first-mover advantages and scope economies not available to other new entrants," making the presence of cable modem competition less relevant, if at all, in the impairment analysis.[30] Indeed, the Commission states that less weight should be given to "intermodal alternatives that do not contribute to the creation of a wholesale market in accessing the customer or do not provide evidence that self-deployment of such access is possible to other entrants."[31] Accordingly, there is no basis for the contradictory position in the line sharing portion of the Order that cable modem retail competition "helps alleviate any concern that competition in the broadband market may be heavily dependent on unbundled access to the HFPL."[32] Ultimately, the line sharing portions of the Order fail to answer the issue raised by the *USTA* Court, *i.e.*, why, if at all, current intermodal alternatives alter the impairment analysis for line sharing.

Finally, the *USTA* decision expressly anticipates, and certainly does not foreclose, the Commission's reinstatement of the line sharing UNE. First, while it "vacated and remanded," the *USTA* decision, in the very next sentence the Court expressly anticipated a remand and reinstatement of line sharing: "[o]bviously any order unbundling the high frequency portion of

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[28] Order, ¶262.
[29] Order, ¶97.
[30] Order, ¶ 98. Further, the Commission has also recently concluded that cable operators do not provide transmission service at wholesale: "[n]one of the foregoing business models by which cable operators provide cable modem service appears to include the offering of any transmission service by a cable operator to an ISP or other information service provider." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 51 (2002), *appeal pending* (footnotes omitted).
[31] Order, ¶ 98.
[32] Order, ¶ 263.

the loop should also not be tainted by the sort of error . . . ."[33] The Court's actions further confirm this: *first*, the *USTA* decision affirmed the Commission's authority to require line sharing;[34] and, *second*, after the decision was issued, the Court granted a petition to stay the effectiveness of its line sharing decision,[35] as well as the Commission's request to extend the stay pending the completion of the Triennial Review proceeding.[36] The Court surely would not have acted in this manner if it believed that the *USTA* decision effectively ended further Commission action on remand to reinstate the line sharing UNE. Moreover, in at least one recent case, the Commission has reinstated rules after the D.C. Circuit vacated and remanded those same rules.[37]

B. The Limited and Prospective Availability of Line Splitting Cannot Support The Elimination of Line Sharing

The Order concludes that CLECs are not impaired without HFPL access due to the availability of line splitting.[38] Yet, while the Commission notes that competitors are serving greater numbers of voice customers, it fails to address the Order's correct finding that no competitive alternatives exist for wholesale customers of ADSL services.[39]

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[33] USTA, 290 F.3d at 429. Moreover, in the very last paragraph of the *USTA* decision, the Court drops its "vacate" language entirely, and states "[w]e grant the petitions for review, *and remand both the Line Sharing Order and the Local Competition Order to the Commission* for further consideration in accordance with the principles outlined above." Id., at 430 (emphasis added).
[34] 290 F.3d at 430.
[35] Order dated 9/4/2002 (D.C.Cir.2002).
[36] Order dated 12/23/02 (D.C. Cir 2002)(extending stay until Feb. 27, 2003).
[37] In USTA v. FCC, 227 F.3d 450 (D.C. Cir. 2000), the Court "vacate[d] the provisions of the *Third Report & Order* dealing with the four challenged [CALEA] punch list capabilities, and remand[ed] to the Commission for further proceedings consistent with this opinion." Id., at 466. On remand, the FCC reinstated the vacated and remanded four CALEA punch-list items. *In the Matter of Communications Assistance for Law Enforcement*, Order on Remand, 17 FCC Rcd. 6896, ¶ 1 (2002) (reinstating items that had been "vacated" by the D.C. Circuit).
[38] Order, ¶ 259.
[39] Order, ¶ 97.

Further, there is no record evidence that line splitting is currently a viable competitive alternative.[40] To the contrary, recent information underscores that even with line splitting, CLECs will only be able to serve a small fraction of the consumers they can serve today using line sharing.[41] In addition, ILECs do not have the necessary processes in place to support line splitting arrangements.[42] According to evidence submitted by the CHOICE Coalition and MCI, line splitting is not a functional substitute for line sharing and the BOCs' OSS for line splitting creates unnecessary costs for CLECs and their customers, delays in obtaining service, unnecessary administrative burdens, and results in discriminatory treatment for CLEC customers thereby placing the CLECs at a severe competitive disadvantage.[43] In its *Line Sharing Order*, the Commission properly rejected arguments that the availability of stand alone loops obviated the need for line sharing and correctly treated line splitting as adjunct to, not a substitute for, line sharing.[44] Given that the Commission's assumptions regarding the viability of line splitting are incorrect, they cannot serve as a basis for eliminating the line sharing UNE.

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[40] The only evidence referenced by the Commission is a Covad press release announcing its *plans* to enter into a line splitting agreement with AT&T. Order, n.767.
[41] *See* Emergency Joint Petition for Stay by the Choice Coalition, CC Docket Nos. 01-338, 96-98, 98-147 (Aug. 27, 2003).
[42] *See id.* and Letter from Kimberly Scardino, MCI, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 96-98, 98-147, WC Docket Nos. 03-167, 03-138 (Sept. 5, 2003).
[43] *Id.*
[44] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order on Reconsideration, 16 FCC Rcd 2101, 2110 (2001) ("...*independent* of the unbundling obligations associated with the high frequency portion of the loop that are described in the *Line Sharing Order*, incumbent LECs must allow competing carrier to offer both voice and data service over a single unbundled loop.") (emphasis added).

C. The UNE Price of Line Sharing is not "Irrational" and Is Not A Valid Basis to Eliminate Line Sharing

The Commission also finds that eliminating line sharing will result in "better competitive incentives" due to the difficulties of pricing the HFPL.[45] The Commission notes that there is no single correct method of allocating loop costs among multiple services.[46] Of course, the Commission already has rules that ILECs must use to ensure loop costs are appropriately allocated, and which ensure that ILEC prices are cost-based.[47] If the Commission is concerned that the cost allocation rules are not sufficiently allocating the costs of the HFPL, the answer is not to eliminate the CLECs' ability to provide DSL services economically, but to revise the rules so that costs are properly allocated. Indeed, in the 1999 *GTE DSL MO&O*, the Commission faced this same question and decided to refer the question of xDSL cost allocations to a Joint Board;[48] subsequently, the Commission imposed an allocation and separations "freeze."[49] Thus, if line sharing prices are a concern, it is one of the Commission's own creation.

Moreover, no evidence supports the Commission's vague assertion that state line sharing pricing presents a "dilemma."[50] Contrary to the Order, CLECs do not have an "irrational" cost

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[45] Order, ¶260.
[46] Order, ¶260.
[47] 47 C.F.R. § 36.
[48] *In the Matter of GTE Telephone Operating Co.s*, Memorandum Opinion and Order, 17 FCC Rcd. 27409, ¶ 9 (1999) ("NARUC raises separations and cost allocation issues that go beyond the scope of the limited issue that was subject to investigation in this tariff proceeding. These are important questions that we intend to address in a separate proceeding in conjunction with the Federal-State Joint Board. Accordingly, we refer NARUC's petition to the Joint Board proceeding in Docket No. 80-286.") ("*GTE DSL MO&O*").
[49] *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, ¶ 2 (2001) (order "impose[s] an interim freeze of the Part 36 category relationships and jurisdictional cost allocation factors" for ILECs).
[50] Order, ¶ 260.

advantage.[51] Line sharing prices are rational and nondiscriminatory: the ILECs charge themselves the same price (e.g., zero) for use of the HFPL as line sharing CLECs obtain it for. As BellSouth recently explained, "no 'loop costs' are allocated to the interstate jurisdiction as a result of DSL deployment. This is because the provision of DSL has no impact on cable and wire facilities, circuit equipment, or working loop counts (either pre or post freeze)."[52] If the ILEC allocates no loop costs to provide DSL, then it is well within the state's discretion to determine that those are the costs of the HFPL.[53] Indeed, the Commission notes that the states have faithfully adhered to the line sharing pricing rules.[54] By contrast, without line sharing (or with the 25%, 50%, and 75% loop price increases adopted in the transition mechanism), the ILECs will have a DSL cost advantage while CLECs will have to purchase the whole loop and recover all of the loop costs from its DSL service. Such a result would be irrational, particularly given the Commission's intention of meeting the "statutory goals of encouraging competition and innovation in all telecommunications markets."[55] If the Commission reinstates line sharing, however, the costs of providing DSL will decrease, thereby benefiting consumers.

II. THE TRANSITION FAILS TO ADDRESS THE ISSUE OF CUSTOMER SERVICE DISRUPTION DUE TO ELIMINATION OF LINE SHARING

While the Commission's stated intention is to minimize disruption to customers,[56] the transition mechanism it adopts will not accomplish that goal. As EarthLink explained

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[51] The statute establishes the standards states use for pricing UNEs and requires that prices are cost-based, nondiscriminatory, and may include a reasonable profit. 47 U.S.C. §252(d)(1).
[52] *Ex parte* letter from Mary L. Henze, BellSouth, to Jane Jackson, FCC, CC Dkt. No. 02-33, at 1 (filed July 8, 2003); *see also, ex parte* letter from W. Scott Randolph, Verizon, to Carol Mattey, FCC, CC Dkt. No. 02-33, 95-20 and 98-10, at 7 (filed June 26, 2003) (same).
[53] *See* Reply Declaration of Terry L. Murray, Covad Reply Comments, CC Dkt. Nos. 01-338, 96-98, 98-147 (Jul. 17, 2002) at 35.
[54] Order, ¶260.
[55] Order, ¶261.
[56] Order, ¶266.

previously, accommodating the CLECs' transition or exit from the market is not the only transitional issue that the Commission faces.[57] Indeed, the easing of CLEC financial issues should not have been the substantial focus of transition issues, at all. The transition merely indicates that line sharing will not be eliminated immediately, but there remains a substantial public interest in an appropriate mechanism or process for *customers* to be transitioned to other providers and avoid DSL service disruption, which was unaddressed in the Order. For existing customers, the length of service during the transition is uncertain because data CLECs may be forced at any time, due to escalating line sharing "transition" costs, to exit the market, stranding ISPs and their end user customers. To the best of EarthLink's knowledge, however, no carrier solution exists for a seamless "hot cut" process to move DSL-based customers from one (exiting) carrier to another (e.g., ILEC).

Until the industry accepts a "hot cut" process for intramodal wireline migration of DSL subscribers from one carrier to another, EarthLink urges the Commission to modify its line sharing rule by deferring the line sharing loop charges. This will provide incumbent LECs with proper incentives to formulate a workable "hot cut" process for the sake of consumers, and avoid pushing data CLECs out of the market immediately. The public interest demands that this issue not be left to the Section 214 discontinuance proceedings, where the exiting carrier would be either bankrupt or have no business reason to work out a "hot cut" solution to the detriment of all consumers and ISPs involved.

[57] *See* Covad/EarthLink Letter and Letter from Mark J. O'Connor, on behalf of EarthLink, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 02-33, 95-20, 98-10, 01-337 (Feb. 6, 2003).

III. THE VIOLATIONS OF APA, THE SUNSHINE ACT, AND FCC PROCEDURES WARRANT A FULL REINSTATEMENT OF THE LINE SHARING UNE

The facts and circumstances of the issuance of the Order and the February 20, 2003, Commission meeting demonstrate a process gone awry – from the failure of the Commission to address line sharing solely on its merits; the post-February 20, 2003, *ex parte* contacts between only certain industry participants and certain Commissioners and their staff; and the post-February 20th changes made to the February 20th terms. These events significantly impacted the line sharing portions of the Order released six months later. Indeed, the Commissioners, by a 4-to-1 margin, agreed that the public interest would best be served by a line sharing UNE. On reconsideration, the Commission should correct these errors by reinstating the line sharing UNE.

A. The Facts Show Highly Irregular Procedures Culminating in the Final Line Sharing Portions of the Order

On February 20, 2003, the Commission held an open meeting to consider the final order in Docket 01-338.[58] The evidence demonstrates, however, that a final order was not then considered, and in fact, not even prepared. Rather, at most, an outline was discussed and voted upon.[59] Even more changes than anticipated were necessary, as on August 21, 2003, Commissioner Adelstein wrote: "the fact that *significant portions of the drafting were not begun in earnest until after the vote* prevented a simultaneous release. We strived to finalize this order

[58] FCC Commission Meeting Agenda (rel. Feb. 13, 2003).

[59] In his September 20, 2003, statement, Commissioner Adelstein wrote: "*We are voting on this item before we have seen a draft reflecting the latest cuts*. This is especially troubling to me on issues of this magnitude. The lights were burning brightly on the eighth floor late last night, and offices reached some agreements on major issues at the eleventh hour – and I mean literally, around 11:00. So *we understandably haven't yet had the opportunity to review all the language reflecting the cuts*. In no way do I want to suggest that the Bureau staff has fallen short by noting the fact *that language reflecting late agreements among commissioners is not yet drafted*. But *I am very uncomfortable voting on this item before the offices have seen the draft orders*, because we all know, the devil is in the details." Separate Statement of Commissioner Jonathan

as quickly as possible."[60] Commissioner Copps' February 20, 2003, statement confirms this: "I am unable to fully sign on to decisions without reservations until there is a final written product," noting that "we finalize the draft in the coming days . . ."[61] Six months later, Commissioner Copps described the February 20, 2003, event as "based on a roughly conceived outline produced under the threat of a judicial deadline."[62] Similarly, Commissioner Abernathy has recently expressed concerns with the post-voting changes to February 20, 2003, outline.[63]

The evidence also shows that a majority of the Commissioners disagreed with the merits of the line sharing decision.[64] Some Commissioners stated that they voted to eliminate line sharing *only* as a compromise to preserve UNE-P, at the expense of line sharing.[65]

S. Adelstein, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 2 (rel. Feb. 20, 2003) (emphasis added).

[60] Separate Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 5 (rel. Aug. 21, 2003) (emphasis added).

[61] Separate Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 4 (rel. Feb. 20, 2003).

[62] Separate Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 3 (rel. Aug. 21, 2003).

[63] Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part, CC Dkt. 01-338, at 1 ("the majority has modified the unbundled switching framework since the February 20 decision . . .") and 8 n.27 ("In my February 20 press statement, I noted that the majority had abandoned the previous four-line limit . . . The majority now announces that it is preserving that limit . . .")(rel. Aug. 21, 2003); "FCC Releases Triennial UNE Review Order," Communications Daily, at 2 (Aug. 22, 2003) (discussing differences between February 20th and final order released, and noting that "Comr. Abernathy . . . said she had some questions about making after-vote language changes . . .").

[64] During the open meeting, for example, Commissioner Copps explained that "I have agreed to join certain decisions that are not my preferred outcome in an effort to find compromise and to avoid even more damage to the competition landscape...[*t]here are aspects of this order that are certainly not my preferred approach but which I have had to accept in order to reach a compromise*. In particular, there is this decision to eliminate access to only a part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. *I believe that line sharing has made a contribution to the competitive landscape. Instead of encouraging it, we provide today only an extended transition period . . .*" Attachment A, hereto, Open Meeting Transcript (as prepared by Miller Reporting Co.) at 12, 14.

[65] *See* Order, n. 782 (majority acknowledges that the line sharing decision was the product of compromise); Separate Statement of Commissioner Jonathan S. Adelstein, Approving in Part,

After the February meeting adjourned with a "roughly conceived outline," the Commission was required to release and publish the rules and order adopted at the meeting; [66] in this case, the process took just over six months. During that period, however, the highly unusual process continued. Specifically, certain private parties, especially Covad and Verizon, were invited to meet with certain Commissioners (or their respective legal staff) after the February 13, 2003, Sunshine Notice to discuss and provide further input on the issues, which had allegedly been voted out on February 20, 2003. The *ex parte* memoranda filed in the docket indicate that there were at least 24 such relevant contacts.[67] Attachment B, hereto, provides a summary of a number of the meetings.

B. The Irregularities Violated the APA, the Sunshine Act, and the *Ex Parte* Rules

1. The Line Sharing Decision Is The Product of an Illegal Private Rulemaking in Violation of APA Section 553 and the Product of Illegal *Ex Parte* Presentations

In a notice and comment rule making, such as this proceeding, Section 553(c) of the APA directs that "the agency shall give interested persons an opportunity to participate in the rule making through the submission of written data, views or arguments with or without opportunity for oral presentation."[68] The FCC's "permit-but-disclose" *ex parte* rules also provide all parties an equal right to participate in the agency rule making process, including responding to other parties' *ex parte* presentations.[69] Here, the evidence shows, however, that the rulemaking on the

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Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 2 (rel. Feb. 20, 2003) ("There has been a great deal of compromise in this process. I am very comfortable with some of the decisions, while others quite frankly give me pause.").

[66] 5 U.S.C. § 553(d) (Administrative Procedures Act ("APA") requires rules and order to be published no less than 30 days prior to effective date, unless specific exceptions granted).

[67] See Attachment B, hereto, "CC Docket No. 01-338 Ex Parte Contacts After Sunshine Notice (Feb. 13, 2003) and Before Order Release (Aug. 21, 2003)."

[68] 5 U.S.C. § 553(C).

[69] 47 C.F.R. § 1.1206(a)(1) (*ex parte* presentations are permissible in informal rulemaking proceedings provided that the party follows disclosure requirements).

line sharing UNE continued after February 20, 2003, but was not open to all interested parties, including EarthLink. Rather, it was a process open by Commission invitation only that offends Section 553 of the APA.

Rulemaking proceedings are open so that all parties have an equal opportunity to participate fully and respond in a meaningful way to arguments and data presented by others. As the D.C. Circuit has noted, courts demand that agency procedures not treat parties "unfairly," and expect agency procedures that " infuse[] the administrative process with the degree of openness, explanation, and participatory democracy required by the APA."[70] By contrast, a process that is preferential or exclusionary – operating by invitation only, and using the FCC's *ex parte* rules to exclude all others[71] – violates this basic tenet of APA rule making.[72]

The discriminatory process that affords some an advantage in the rule making process is the hallmark of arbitrary decision making that the APA was intended to eradicate.[73] In this proceeding, all parties should have been afforded the opportunity to respond on the record to post-February 20th arguments and data. In EarthLink's case, as a major ISP customer of Covad line-shared DSL services, the adopted transition presents issues unique to EarthLink and

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[70] Weyerhauser Co. v. Costle, 590 F.2d 1011, 1030 (D.C. Cir. 1978) (EPA rule making remanded where agency relied on data not available for public comment; "the Agency's procedures . . . denied petitioners the opportunity to comment on a significant part of the Agency's decisionmaking process as required by section 553 [of the APA]").

[71] From February 13, 2003 until August 21, 2003, the FCC's *ex parte* rules prevented all others from presenting additional arguments or data to the Commission regarding the UNE Triennial Order. 47 C.F.R. § 1.1203(a)&(b).

[72] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959) (One party to an FCC rule making proceeding should not be allowed to make *ex parte* contacts after the time when all parties were permitted to make such contacts because "basic fairness requires such a proceeding to be carried on in the open.").

[73] *See, e.g.*, Sprint Corp. v. FCC, 315 F.3d 369, 373 (D.C. Cir. 2003) (the purpose of the Section 553 notice requirement is to "expos[e] regulations 'to diverse public comment'" and to "ensur[e] 'fairness to affected parties'" (*quoting* Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F. 2d 506, 547 (D.C. Cir. 1983)).

EarthLink subscribers, and yet this rulemaking process – unlike any other the Commission has ever held – provided no opportunity to respond to the post-February 13, 2003, positions presented by Covad, Verizon and others.[74] Indeed, given that EarthLink was so dramatically impacted, the process may even have violated constitutional due process obligations.[75]

The record shows, however, that a few parties had multiple meetings and submitted written information after the February 20, 2003, meeting. For example, one day after the FCC open meeting, Covad submitted a two-page outline described as "transitional mechanisms to apply if linesharing (sic) is removed as a UNE," which detailed Covad's preferred position on the transition issues.[76] The record shows that, even as late as mid-May, the rulemaking issues were still openly debated between Verizon and Commission staff. Specifically, Verizon's May 19, 2003 five-page letter reflects a May 16, 2003, meeting with Commission staff, argues against Covad's post-February 20, 2003, submittals.[77]

Moreover, if the Commission determines (wrongly, in EarthLink's view) that the Commission did adopt the final Order at the February 20, 2003, meeting, then it is apparent that the more than 20 *ex parte* contacts occurring after the meeting violated the Commission's *ex parte* rules. To be sure, the *ex parte* rules provide a narrow exception to the prohibition on

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[74]See, Section II, above. Neither Verizon nor Covad represent the interests of EarthLink or its subscribers served by line sharing arrangements. Indeed, Verizon opposed line sharing entirely. As for Covad, which surely advocated line sharing, the transition raises issues in which a vendor and customer have some different interests. For example, EarthLink is Covad's customer and the terms of Covad's possible line sharing discontinuance due to regulatory events would mean different interests for Covad and EarthLink.

[75] *See*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 436 U.S. 519, 542 (1977) (in rule making proceeding where small number of participants are "exceptionally affected," "additional procedures may be required to afford the aggrieved individuals due process" (citations omitted)).

[76] Att. B, e*x parte* Letter from Jason Oxman, Covad, to FCC, CC Dkt. No. 01-338 (filed Feb. 24, 2003).

contacts after the February 13, 2003, Sunshine Notice was released.[78] However, if one assumes that the Commission had already resolved extant issues and voted on the final order, this exception would have no application; no "adduction of evidence" would have been necessary. Further, the Covad and Verizon *ex parte* notices underscore that the meetings were not to fill in a minor citation or fact issue; rather, both parties argued over the utility of the line sharing UNE and the best method of transition if the line sharing UNE were eliminated.[79] For *ex parte* purposes, these contacts were at the core of the substance of line sharing and included critical new data on the issue.

The Commission's failure to follow its own rules warrants a reexamination of whether the line sharing decision was, in fact, based on illegal *ex parte* contacts.[80] As the Commission has noted, "the objective [of the *ex parte* rules] is grounded upon basic tenets of 'fair play' and 'due process' that are embodied in the Constitution and other laws and which, we believe, are indispensable to preserving the public's trust and confidence in the integrity of the Commission's processes"[81] and the "major function [of the *ex parte* rules] is to ensure that our decisional

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[77] Att. B, e*x parte* Letter from Suzanne Guyer, Verizon, to FCC, CC Dkt. No. 01-338 (filed May 19, 2003).

[78] 47 C.F.R. § 1.1204(a)(10) (presentation during the Sunshine period permissible where "[t]he presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues . . . ").

[79] Attachment B (copy of Covad and Verizon letters outlining positions during post-February 20th meetings).

[80] Columbia Broadcasting System v. United States, 316 U.S. 407, 422 (1942) (FCC's rules "are controlling alike on the Commission and all others whose rights may be affected by the Commission's execution of them"); Sangamon Valley Television Corp., 269 F.2d at 224 (Where *ex parte* violation occurred in FCC rulemaking proceeding, "[a]gency action that substantially and prejudicially violates the agency's rules cannot stand.").

[81] *In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, Report and Order, 2 FCC Rcd. 3011, 3012 (¶ 5) (1987). *See also, In the Matter of Amendment of 47 C.F.R. §1.1200 ET SEQ. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, 12 FCC Rcd. 7348, 7349 (¶4) (1997) (FCC rulemaking to improve ex parte

processes are fair, impartial, and otherwise comport with the concept of due process."[82] It is obvious that a failure occurred here.[83]

2. The Vote on an Outline, and Not a Final Order, Violates the Sunshine Act and Invalidates The Results of the February 20th Meeting

At the February 20th open meeting, while a vote was taken, the evidence shows that no final order existed on that day and, even more, that the terms of the final order were not formulated until well after the February 20th meeting. This procedure violates the Sunshine Act, as codified at Section 552b of the APA, which provides that "every portion of every meeting of an agency shall be open to public observation."[84]

As explained in Communications Systems Inc. v. FCC,[85] the Sunshine Act permits the Commission to conduct jointly its business, such as adopting a rulemaking order, through one of two methods: a presumption in favor of voting by open meeting[86] or, in some cases, by circulation. In this proceeding, however, the evidence shows that the Commission had only a "roughly conceived outline" and no final order to adopt at the open meeting. On what date and by what process the order was made final is unclear, and it is exactly this same "closed door" agency decision making that the Sunshine Act was intended to proscribe.[87] In this case, the

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regulations "sought to enhance the ability of the public to communicate with the Commission in a manner that comports with fundamental fairness").

[82] Id., at 3012 (¶ 8).

[83] One tangible example is footnote 787 of the Order, which relies on a Covad *ex parte* filing of February 24, 2003 to justify one aspect of the line sharing transition rule.

[84] 5 U.S.C. § 552b(b). This violation is reversible error, since reviewing courts must "hold unlawful or set aside agency action . . . found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

[85] 595 F.2d 797 (D.C. Cir. 1978).

[86] The Communications Act also suggests a presumption in favor of open public meetings. 47 U.S.C. § 154(j) ("Every vote and official act the (sic) Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested.").

[87] As the D.C. Circuit has noted, the purpose of the Sunshine Act is "to make government more fully accountable to the people. . . . the Act established a general presumption that agency

Commissioners' statements (quoted above) make clear that no final order or rules were adopted on February 20, 2003. Further, the multiple post-February 20th meetings requested by the Commissioners offices, and the *ex parte* notices showing that the line sharing UNE and the transition rule were being debated and had not yet been finalized underscore that no final Order existed. Indeed, there can have been no plausible purpose for the volume of meetings other than to affect the ultimate outcome of the Order.[88]

Nor is it sufficient for the Commission on February 20, 2003, to have reached some tentative arrangement regarding the rough terms of major issues, and then to have reviewed and finalized the final rules and Order six months later. The Sunshine Act is not so easily skirted. Its legislative history makes clear, "[t]he meetings opened by [the Sunshine Act] are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny."[89] In the same way, once the agency decides that the vote on an order is subject to an open meeting, portions of its final decisional processes of that order cannot be shielded from public view. The Sunshine Act requirements apply to items presented in open meeting votes; "[i]f there is an anomaly here, it was created by the choice of Congress."[90] Since the FCC has conducted no other final meeting to vote on these rules, the February 20th open meeting cannot be propped up as the final vote of the rules and the Order.

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meetings should be held in the open." Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921, 928-929 (D.C. Cir. 1982). Further, "Congress applied the principle of openness to the deliberations of multi-member agencies because it believed that the public should be able to observe the 'give-and-take discussion between agency heads,' each of whom had been selected by the President and confirmed by the Senate." Id., at 930.

[88] Order, n.787 (citing Covad February 24th *ex parte* presentation).

[89] Common Cause, 674 F.2d at 930 (*quoting,* S. Rep. No. 94-354, 94th Cong., 1st Sess, 18 (1975)).

[90] Id., at n. 42.

3. The Failure to Address Line Sharing Solely on its Merits Violates the Communications Act and the APA

As discussed in Section III. A. above, it is clear that Commissioners voted for the elimination of the line sharing UNE even as they disagreed it was in the public interest or furthered the goals of the Communications Act. The Communications Act, however, demands more, and Section 251(d)(2) of the Act commands the Commission to implement rules determining *each* network element that should be available under the relevant statutory standard.[91] The line sharing UNE should have been addressed on the basis of its own merits and not in relation to the merits of another UNE. Such action is simply not consistent with the public interest requirements of the Act or the Commission's Section 251(d) rule making authority.[92]

What several Commissioners and the Order refer to as a "compromise" also violates the Section 706 of the APA because courts are left with no record of the agency's *actual decision making* – the factors, data, and interests actually relied upon by a majority of the Commissioners – upon which to determine whether or not the agency acted within its delegated authority. Indeed, Section 553(c) of the APA demands that agencies incorporate "a concise general statement" of the "basis and purpose" with the rules adopted so that the judiciary can carry out its essential statutory review function. As the Supreme Court has explained, "Section 706(2)(A) [of the APA] requires a finding that *the actual choice made* was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a

[91] 47 U.S.C. § 251(d)(2).
[92] Schurz Communications Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) (FCC adoption of complex compromise between industry participants is reversible error).

consideration of relevant factors and whether there has been a clear error of judgment."[93] Thus, while the Order (at n. 782) concedes that compromise was involved in the line sharing decision and explains that "compromise" may be an acceptable agency action, the APA also requires the compromise in this proceeding to be explained fully in the Order, and not left as an unwritten subtext impossible for judicial review. While footnote 782 cynically argues that the APA requires only "*a* legal justification"[94] when agency compromise is reached, this is a legal error. The Order failed to explain "the actual choice made" in the compromise, that is, the reasons for the UNE-P/line sharing trade-off. As the *Schurz* court explained,

> "One might be tempted as an original matter to treat an administrative rule as courts treat legislation claimed to deny substantive due process, and thus ask whether on any set of hypothesized facts, whether or not mentioned in the statement accompanying the rule, the rule was rational. . . . But that is not the standard for judicial review of administrative action. It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational – must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency is charged with solving."[95]

CONCLUSION

For the foregoing reasons, EarthLink urges the Commission to reconsider the Order. On reconsideration, the Commission should reinstate the line sharing rule nationwide or, as a secondary option, reinstate the rule but allow the state to conduct a more granular analysis of the

[93] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (emphasis added), *rev'd in part on other grounds*, Califano v. Sanders, 430 U.S. 99, 105 (1977); *see also*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable . . . .").
[94] Order, n. 782 (emphasis added).
[95] Schurz Communications Inc., 982 F.2d at 1049.

status of line splitting implementation and availability (within 90 days), consistent with other decisions of the Order.

Respectfully Submitted,

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Dated: October 2, 2003

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION

OPEN AGENDA MEETING

Thursday, February 20, 2003

[TRANSCRIPT PREPARED FROM A VIDEOTAPE RECORDING.]

P R O C E E D I N G S

CHAIRMAN POWELL: Good morning, everyone, and welcome to the February meeting of the Federal Communications Commission.

Before we get started, are there any opening comments from the bench?

Hearing none, Madam Secretary, could you announce today's agenda, please.

THE SECRETARY: Thank you, Mr. Chairman, and good morning to you, and good morning, Commissioners.

For today's agenda, you will consider a report and order concerning incumbent local exchange carriers' obligations to make elements of their networks available on an unbundled basis. The consideration of this item, to be presented by the Wireline Competition Bureau, is your agenda for today.

CHAIRMAN POWELL: Thank you, Madam Secretary.

Chief Mayer (ph).

MR. : Thank you, Mr. Chairman.

The triennial review item before the commission this morning reflects voluminous input from the public and over a year's intensive work by the commission.

The item before you proposes a new analytic framework for evaluating the unbundling obligations of incumbent local exchange carriers under section 251 of the

Communications Act. The item applies that framework to specific network elements.

Joining me at the table today are several of the bureau managers who worked on this item. Senior Deputy Bureau Chief Jeff Carlisle (phon.); Competition Policy Division Chief Michelle Carey (phon.); and Deputy Division Chiefs Tom Navin and Brent Olsen (phon.).

I also want to especially acknowledge and thank the numerous commission staff members who worked on this item, on holidays, through blizzards, and late into the night.

I turn now to Ian Dilner (phon.) of the Competition Policy Division representing those staff members who will present the item to you.

MR. : Good morning, Mr. Chairman and Commissioners.

Just over one year ago the commission undertook a review of its policies implementing the market-opening provisions of the 1996 Act that required incumbent local exchange carriers to make elements of their networks available on an unbundled basis to new entrants at cost-based rates.

Today we present the outcome of that review.

The commission's task of interpreting the market-opening provisions of the act has not been an easy one. Today's order, however, draws on the commission's experience

and the experience of the telecommunications industry over the past seven years.

Moreover, this item responds to the D.C. Circuit Court's USTA opinion.

The item we present today requires a granular level of impairment analysis with a substantial role for your state commission colleagues to unbundle only where requesting carriers are impaired without access to an incumbent LEC's network elements.

The item also encourages the deployment of advanced broadband capabilities to all Americans, and seeks to maximize consumer welfare by encouraging local competition.

Now I would like to highlight a few of the findings in this order.

The impairment standard, stated simply, reads:

A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic. Such barriers include scale economies, sunk costs, and first-mover advantages.

Regarding broadband issues. The item provides substantial unbundling relief for loops utilizing fiber facilities. First, the item requires no unbundling of fiber to the home loops.

Second, the item elects not to unbundle bandwidth for the provision of packetized (phon.) broadband services for hybrid loops, loops where incumbent LECs deploy fiber into the neighborhood but short of the customer's home. The item does preserve carriers' existing high-capacity loop access rights.

Third, line-sharing will no longer be available as an unbundled element subject to a transition period.

The item also clarifies two aspects of TELRIC (phon.) where the risks associated with new facilities and services are most likely to appear in the price of the element.

First, we clarified that the TELRIC-based cost of capital should include the risks of a competitive market and should reflect any unique risks associated with new services that might be provided over certain types of facilities.

Second, we clarify that in calculating depreciation expense, the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market that TELRIC assumes.

Regarding switching. The item finds that switching a key UNE-P element for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment.

Under this framework, states will have 90 days to rebut the national finding.

For mass market customers, the item sets out specific criteria that states shall apply to determine on a granular basis whether economic and operational impairment exists for a particular market.

State commissions must complete such proceedings within nine months. Upon a state finding of impairment, the commission sets forth a three-year period for carriers to transition off of UNE-P.

Regarding transport and high capacity loops, the item finds that requesting carriers are not impaired without optical carrier, or OCN capacity circuits.

However, requesting carriers are impaired without access to dark fiber, ES-3, and DS-1 capacity circuits, each independently subject to a granular review by states to identify available wholesale alternatives.

Dark fiber and DS-3 circuits also each are subject to a review by the states to identify where competing carriers are able to provide their own facilities.

Enhanced extended loops, or EELs combinations, will be subject to safeguards, including architectural criteria to prevent gaming.

Finally, this item will set forth a transition plan to smoothly implement the new rules without disrupting existing interconnection agreements.

In summary, this item goes far to spur investment in broadband facilities, promote competitive alternatives, and continue the Federal and state partnership on these crucial issues.

The Wireline Competition Bureau respectfully requests that you adopt this item, and we request editorial privileges.

Thank you.

CHAIRMAN POWELL: Thank you very much, Ian.

Commissioner Abernathy.

COMMISSIONER ABERNATHY: Thank you, Mr. Chairman. And first and foremost, I want to think the bureau. You guys have done yeoman's work. You have worked long hours. You have responded to all our questions. You have done everything that we could ask. So thank you very, very much.

I believe that today's order has in it some very good outcomes that I heartily endorse, and also some outcomes that I think are unfortunate and I will not endorse, in fact, I will dissent to.

So let me start with what I think is the good news. The good news first.

With regard to broadband, I am pleased to support the unbundling relief for new broadband investment. I think one of our core mandates of the '96 Act, and one of my core mandates as a commissioner, is to facilitate the deployment of broadband infrastructure, and the key question is how do

we do that. How do we balance a desire for investment in infrastructure for new broadband while at the same time recognizing that we must balance competitors' needs for access to various capabilities that the RBOCs (phon.) in their network.

What we have done here is we have said we are going to remove regulatory obstacles to deployment of new infrastructure, new broadband networks, and that means that these networks do not have to be unbundled under the UNE framework. They can be offered, of course, at market prices, but not under the TELRIC obligation.

The record suggests that in the absence of this kind of a decision, we would have tremendous uncertainty out there. There would be a failure to be able to make the risky investments that we know companies have to make when they head down this path, and there was definitely a chill on investment, and that's why I embrace today's decision. I think it will bring consumers the benefits of increased innovation and increased investment, more robust services, and I also believe that we will see increased competition overall, both intermodal and intramodal, and our decision ensures that CLECs will continue to have the same broadband access to high capacity loops that they receive today. We are not taking anything away. We are simply removing the shackles for future investment, and I think that this will provide a much-needed stimulant to the economy and provide a

great deal of certainty for all the parties out there as they devise their business plans for the years to come.

I am also pleased to support the part of the item that gives facilities-based competitors access to the critical elements that they need to compete. We have taken steps to break down the primary competitive roadblocks cited by the facilities-based CLECS, including access to high capacity loops, transport, and EOs (phon.). These are all parts of the network that I believe they need access to under the impairment analysis in order to compete. And while I think it is safe to say that we have had to make a number of compromises in order to bring everyone onboard, I am comfortable with all those compromises, and I think at the end of the day we have a very strong, sound decision.

Lastly, I appreciate my colleagues' willingness to seek additional comment on a proposal that I developed to modify what is called the pick-and-choose rule. I am convinced that as we move forward we need to modify that rule because it impedes the type of marketplace negotiations that we want to see in this market, and that were intended by Congress. So I look forward to developing a new record on that piece of the item.

Now while I support those parts of the order, I am deeply disappointed by the commission's resolution of the unbundled switching issue, the UNE-P issue.

I stated several weeks ago when I testified before the Senate Commerce Committee that what I would look at when analyzing these issues that are very complex, first, follow the statute, and second, craft clearly defined rules and provide regulatory certainty. And I think that the switching part of today's order does neither of those things.

This is not an academic exercise where all things are possible. We are faced with the challenging task of crafting rules that are legally sustainable and, at the same time, provide certainty for the businesses competing in the wireline market. And as I know from working in the industry, complicated, multilevel regulatory frameworks are a lawyer's dream, but they are terribly costly and devastating for the businesses who are trying to plan for the years ahead.

Now my last job before joining the FCC was working for a CLEC, so I know firsthand the challenges that the CLECs face. I know the economic climate that they are involved in today, and I understand all the issues and challenges that they face when they are trying to compete for new customers that are currently in the hands of the RBOCs. But my job today is to follow the statute and say where and when and how is there impairment, and I think when it comes to switching that the finding that majority adopts, which is generally a finding of apparently impairment, but

then delegating all the analysis and the decisions to the states, will be a nightmare for anyone trying to carry out a business. You will have to go state by state. You will have to do analysis after analysis. You will be involved in litigation at the state level. You will be -- the carriers, whether ILECs or CLECs, will be involved in litigation in front of the courts, and I think that that is a bad decision.

We could have provided clarity either way. You know, we could have said yes, there's impairment, or no, there is not impairment, but we didn't do either. Instead, the majority has gone in this other direction, which I simply think makes no sense.

So I worry about the legal sustainability of that part of our order. I worry about the impact that it has on the companies that are out there trying to compete. I respect my colleagues' rights to disagree with me on this policy, and I understand why they have headed down the path that they have, but I think it's a path that is based on sort of a comfort level with how the world might work as opposed to how the world really in fact does work.

Thank you very much.

CHAIRMAN POWELL: Thank you.

Commissioner Copp.

COMMISSIONER COPP: Thank you, Mr. Chairman.

Seven years ago this month Congress enacted a sweeping reform of our Nation's telecommunications laws. In doing so, it sought to promote competition in all telecommunications markets, and to replace the heritage of monopoly with the vitality of competition. Provisions to open the local markets to competition are at the heart of this congressional framework. The act contemplates three modes of competitive entry into the local market: construction of new networks, use of unbundled elements of the incumbent's network, and resale.

The competition envisioned in the legislation is now and only now becoming a reality. Today, because of the vision of Congress and the hard work of American entrepreneurs across the country, there are 20 million competitive lines serving consumers, and the number continues to grow, in spite of the severe economic downturn that the telecommunications industries and the Nation have suffered.

This triennial review offered us the opportunity to encourage this competition and to fulfill the mandate of the law which is to "secure lower prices and higher quality services for American consumers."

In some ways today's action advances that mandate. We preserve voice competition in the local markets and allow it to grow. We accord the states an enhanced role in making the granular determinations about where the rules of the

game may need to be changed, and where they should be maintained in order to foster competition. One month ago these gains were not expected.

In other equally and important ways, however, we failed our charge. Some competition strategies are harmed by today's decision, and I believe, worst of all, we are playing fast and loose with the country's broadband future, denying the competition air it needs to breathe in order to flourish. Consumers and the Internet may well suffer.

Today's item is not the one that I would have written had I been given carte blanche. Each of my colleagues could make the same statement. I have agreed to join certain decisions that are not my preferred outcome in an effort to find compromise and to avoid even more damage to the competition landscape.

I appreciate the willingness of my colleagues to engage in these discussions, to find common ground. There are, however, aspects of this order with which I cannot agree.

As I review the decisions we make today, I have tried always to keep in mind that setting competition policy is the exclusive jurisdiction of Congress. I have done my utmost to remain faithful to the public interest and to the competition framework that Congress adopted in the 1996 Act. Where I am unable to square a decision with the statutory

directives, I am compelled to dissent. Permit me to highlight a few of the most important issues.

On the positive side, in the face of intense pressure for the commission to make broad, nationwide findings on impairment, findings that would have doomed the future of unbundled elements such as switching, we have instead managed to cobble together a majority for a more reasonable process to conduct the granular analysis that takes into account geographic and customer variation in different markets.

We recognized that the states have a significant role to play in our unbundling determinations. We have understood in many parts of this order that the path to success is not through preemption of the role of the states, but through cooperation with the states. State commissions with closer proximity to the markets are often best positioned to make the fact-intensive determinations about impairments faced by competitors in those local markets.

I am therefore pleased with our decision that states should have an active part in conducting the granular analysis necessary to determine whether and where network elements such as switching should be available as unbundled network elements.

On transport, I believe the item is significantly improved from where it might have been. Dark fiber remains on the list of network elements. Limitations on high

capacity transport were done in a manner that was responsive to the facilities-based competitors' concerns. And transport is not removed without a specific finding on impairment, rather than based on some notion of contestability in the market.

There are aspects of this order that are certainly not my preferred approach but which I have had to accept in order to reach a compromise. In particular, there is a decision to eliminate access to only part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. I believe that line sharing has made a contribution to the competitive landscape. Instead of recognizing this contribution and encouraging it, we provide today only an extended transition period to allow competitors to purchase the entire loop facility as a network element, or to pair with a voice provider to offer the full range of services to a customer.

Finally, there are parts of this order with which I strongly disagree. Most importantly, I am troubled that we are undermining competition, particularly in the broadband market by limiting on a nationwide basis in all markets for all customers competitors' access to broadband loop facilities whenever an incumbent deploys a mixed fiber copper loop.

That means that as incumbents deploy fiber anywhere in their loop plan, a step carriers have been

taking in any event over the past years to reduce operating expenses, they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market.

The commission has recognized time and again that loops are the ultimate bottleneck facility. Yet this commission has chosen in this instance to perpetuate the bottleneck and it does so on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts.

To make matters even worse, in some markets such as the small and medium business market, there may not be any competitive alternatives if competitors cannot get access to loop facilities.

I fear that this decision may well result in higher prices for consumers and put us on a road to remonopolization of the local broadband market.

Additionally, I worry about the negative impact of the decision on facilities-based carriers which are practicing the kind of competition we all talk about encouraging. They face challenges enough in these difficult times without having us add to the burdens.

A word to the wise. Other decisions are hurtling towards us. As harmful as this decision may be, it may not

be the last battle this year in the head-long rush to deregulate broadband. In a few short months, maybe sooner, we will consider whether to deregulate broadband entirely by removing core communications services from the statutory frameworks established by Congress.

Opponents of this change argue that this is substituting our own judgment for that of the law, and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another.

We will also consider whether large incumbent carriers providing broadband services should henceforth be regarded as nondominant or lacking market power rather than dominant and exercising market power.

In light of our goals of establishing certainty and stability, I hope we would proclaim today that we will not overturn these unbundling obligations in those proceedings over the next few, short months. But it could happen.

It is no secret that some parties urged us to go much further today toward a wholesale upending of the current telecommunications landscape, just when competition was beginning to take hold. Instead of preserving, protecting, and defending competition, their idea seemed to be tearing away the infrastructure that undergirds that competition.

Today's decision is not just a big-ticket item for telephone companies on one side or another of some admittedly arcane issue. It affects us all. It's next month's phone bill, but it's also the next generation's broadband, and the future of the Internet. It will deeply affect our country's future. We have got to make good, smart decisions. On broadband, at least, I do not believe we have done this.

I am also worried about process here. Seven years ago when Congress passed the landmark Telecommunications Act, the commission implemented the regulatory directives in a bipartisan fashion by unanimous vote reaching consensus under extremely short, tight statutory deadlines.

Today, by contrast, we adopt one of our most important decisions to date by a split decision plagued by shifting pluralities. I am disappointed that we were not able to reach compromise on all of the questions and issue a unanimous decision as previous commissions were often able to accomplish.

Perhaps, given the different philosophical and regulatory approaches which exist among us, that just wasn't in the cards here. Nevertheless, I believe we have some lessons to learn about smoothing the process within, exchanging ideas and paper earlier on, and making sure we have enough time to reach and hammer out final agreements.

I also believe that the constraints placed upon commissioners by laws that forbid more than two of us from meeting together, talking together, and reaching agreement together, hobble the regulatory process and retard our ability to tackle complex proceedings, such as this one.

I don't know of any other institution that is forced to operate this way. Maybe the ability to manage our discussions differently would not have rescued this item, but I do think it could make a difference going forward, and we have a lot of work to do going forward.

One item that requires our immediate attention is performance matrix. Ideally a decision on this would have preceded today's decision so that incumbents and competitors alike would know what is expected of them regarding the now fewer regulatory requirements they must meet.

In light of the positive and negative parts of today's decision, I will vote to approve in part, concur in part, and dissent in part. Although the bottom lines have been decided, the devil is more often than not in the details. I am unable to fully sign onto decisions without reservations until there is a final written product.

As we finalize the draft in the coming days, I hope all of the agency's resources will be working towards implementing the majority's opinion on all aspects of the order so that it can withstand the inevitable scrutiny and litigation that is sure to follow. If we do not dedicate

all of our resources to perfecting this order, we will be vulnerable to the accusation that we are throwing up our hands and expecting the court to step in. That's not good government.

The FCC team has an uncommonly high share of bright, talented and dedicated people, among the country's best, I think, inside or outside of government. I want to thank Bill Mayer and his team for their tireless efforts, and for the dedication exhibited by the Wireline Bureau, OGC, and others throughout this proceeding. I would like to thank each member of the team individually, because I know how hard they worked and how late they burned the midnight oil. And most of all, I want to thank my senior legal adviser, Jordan Goldstein (phon.), for the endless hours, the encyclopedic knowledge, and the invariably good judgment he brings to all of these issues. For his work here, I think he deserves both a Silver Star and a Purple Heart.

Thank you very much.

CHAIRMAN POWELL: Thank you.

Commissioner Martin.

COMMISSIONER MARTIN: First, I would also like to thank my colleagues, and certainly all of the staff for the extraordinary amount of hard work and dedication that has gone into this order. I know it has been particularly difficult with vacations and with all the other issues that

have arisen, including the blizzard, so I do want to thank you all individually for all of your efforts.

This has been an extraordinarily difficult decision for the commission. The issues we addressed today are extremely complicated. They involve complex and technical detailed rules of almost a Byzantine nature, but the decisions we make today will have a direct impact on consumers, on the rates they pay for communication services, as well as the ability of those services. And these decisions also could impact the health and growth of the communications industry and ultimately the economy as a whole.

Perhaps then it should not be surprising that reaching a complete consensus on the issues has been difficult. In the end, I support this item because I believe it achieves a principled and balanced approach. It ensures that we have competition and deregulation. We deregulate broadband, making it easier for companies to invest in new equipment and deploy the high speed services that consumers desire. We preserve existing competition for local service. The competition that has enabled millions of consumers to benefit from lower telephone rates. And we continue the strong role of the states in promoting local competition and protecting consumers.

And, finally, we accomplish these goals in a manner that is consistent with the statute and the rulings of the courts.

This order takes important steps towards deregulating broadband and encouraging new investment. I have long believed that the commission should make broadband its top priority and create proper incentives for new investment in advanced services. The action we take today provides sweeping regulatory relief for broadband and new investments. It removes unbundling requirements on all newly developed fiber to the home. It provides regulatory relief for new hybrid copper facilities, while ensuring continued access to existing copper. And it adjusts the wholesale prices for all new investment.

And, in fact, we endorse and adopt in total the High Tech Broadband Coalition's proposal for the deregulation of fiber to the home and any fiber that is used with new packet technology.

Companies desiring to push fiber further to the home will now be able to make a fair return on their investment, and more consumers will be able to enjoy the fast speeds and exciting applications that a true broadband connection offers.

I hope this relief will jump-start investments in next-generation networks and facilitate the deployment of advanced services to all consumers, including rural America.

Our actions could then revitalize the advanced services market, leading to a new period of growth in telecommunications, and most importantly, the manufacturing sector.

This order also works to preserve local competition. The Telecommunications Act requires that competitors have access to the pieces of the incumbent's network when they are impaired in their ability to provide service.

The Court of Appeals has made clear that in analyzing impairment, uniform national rules may be inappropriate. Rather, the commission should take into account specific market conditions and look at specific geographic areas. Today's item follows these admonitions, putting in place a granular analysis that recognizes that competitors face different operational and economic barriers in different markets. The barriers that competitors face in deploying equipment and trying to compete are different in Manhattan, Kansas than in Manhattan, New York.

Although some of my colleagues disagreed with certain aspects of this analysis, this disagreement primarily concerns the switching network element for residential consumers, a small piece of the puzzle. We all agree that states should play a significant role in determining whether an impairment exists for transport. We all agree that states should play a significant role in

determining whether impairment exists for loop facilities. And we all agree that incumbents should no longer be required to unbundle switching for business customers.

Some of my colleagues also wish to end the unbundling of all residential switching immediately. I believe such action would be inconsistent with recent court decisions and the state of competition in the market. It is true that there are now a significant number of residential telephone customers that receive service from a CLEC, but the overwhelming majority of these customers are currently served through an incumbent switch. To declare an immediate end to the unbundling of all switching in every market in the country would ignore the court's mandate for more granular analysis and effectively end residential competition.

Accordingly, I support the item's approach to treat residential switching as we do the other network elements, removing unbundling obligations only after a fact-specific market analysis.

And, finally, in establishing these market-specific impairment analyses, this item provides an important role for the states. During my time at the commission, I witnessed firsthand the helpful role that the states have played in our mutual goal of implementing the 1996 Telecommunications Act.

I would like to recognize in particular Dave Sponda (phon.), the current president of NERUC (phon.), and Becky Kline (phon.), the chairwoman of the Texas PUC, who are here today.

I believe to do the work that they have done in the other states, they are in the best position to make the highly fact-intensive and local impairment determinations required by the courts.

All of my colleagues agree with this principle when it is applied to some of the unbundling network elements, such as transport. Some felt, however, that we should not allow a state role in determining the unbundling of switching. In my view, the item correctly treats switching as it does the other elements, recognizing that the states are better able to make individual factual determinations about particular geographic markets than the Federal regulators in Washington.

And just as we do for other network elements, the commission provides the states detailed guidelines of what constitutes impairment. For example, we specifically require states to consider and resolve problems with the provisioning, the so-called "hot cut" problem.

We also require states to consider whether competitors have been successfully able to deploy their own switching facilities.

We provide a roadmap for states to use in making their analysis, putting us on the road to facility-based competition.

In the end, I believe we have crafted a balanced package of regulations, to revitalize the industry by spurring investment in next-generation broadband infrastructure, while also maintaining access to the network elements necessary for new entrants to provide competition services.

The order adopts clear rules and immediate regulatory relief for broadband deployment in new investment. It removes the obligation to unbundle switches for business customers immediately. And it provides a detailed roadmap for eliminating the remaining unbundling obligations for network elements.

I believe in limited government. I believe competition, not regulation, is the best method of delivering the benefits of choice, innovation, and affordability to consumers. The 1996 Act puts in place a policy that requires local markets be opened to competition first, and then provides for deregulation. Competition first, and then deregulation.

I believe we have faithfully implemented this policy today. Where there is facility-based competition, for example, from cable modems in the broadband market, or

CLECs in the business market, we have provided deregulation. This is what the law and the courts require.

In sum, this order achieves a balanced approach that provides regulatory relief for incumbents, new investment, and advanced services, while ensuring that local competitors will continue to have access to be able to provide services to consumers.

I believe these steps will benefit consumers and the industry, and I support the order.

Again, I would like to thank all of my colleagues and the staff for all their dedication and hard work on this.

Thank you.

CHAIRMAN POWELL: Thank you.

Commissioner Adelstein.

COMMISSIONER ADELSTEIN: Thank you, Mr. Chairman.

Mr. Chairman, today I am voting on my first item as a new commissioner. I am just glad it was such an easy one.

[Laughter.]

COMMISSIONER ADELSTEIN: I want to thank Bill Mayer and the entire team at the Wireline Competition Bureau, and OGC and all the others that worked on this, for all the hard work that's gone into it, and I know you worked over holidays and through snow storms and whatever it took. I have only experienced two months of intensive lobbying

over this issue, and I can't imagine what you have been through over the past year.

I especially also want to thank my own legal adviser on this, Lisa Zeyna (phon.), who lost a lot of sleep in this process, both worrying about it and working on it late into the night. She has made enormous contributions to the final product, and she deserves a lot of appreciation for that.

We have seen a lot of heated debate over this matter, and rightfully so. It goes to the fundamental question of what the Telecom Act of 1996 means, and what Congress intended to accomplish with it.

What's the state of competition in the market today? What remains for the FCC to do to open these markets, and where is existing competition sufficient to warrant deregulation, as envisioned by the Telecom Act?

The importance of getting the answers right is underscored by the huge economic challenges now facing the telecommunications industry. We have seen more than half a million jobs lost in the past 18 months. Capital expenditures are plummeting. Equipment manufacturers are engaged in unprecedented layoffs, and their very existence, in some cases, is at stake.

All this threatens the quality of our telecommunications system, which suffers if investment in the network declines. Ultimately consumers will pay the

price if service quality goes down, or if they can't get access to the latest technologies at reasonable prices.

So the real goal of Congress in the Telecom Act was to promote investment in our telecommunications infrastructure so that consumers could benefit from the most advanced technologies at reasonable prices. This means we must create a stable and clear regulatory environment that promotes competition, without burdening incumbents with unnecessary obligations. It's unbundled elements that are otherwise available without impairment.

In a debate of this complexity, the difference between the right and wrong proposal can be a matter of degree. I had hoped we could work within that middle ground to find consensus on this item. Consensus can generate a policy framework that addresses all of the competing factors in the debate and it enhances the sustainability of the final outcome, which is important for stability in the market.

The fact we could not agree on all aspects reveals major policy differences over the proper role of the states, as my colleagues have indicated, and what the commission must do to facilitate competition, particularly in the switching and broadband markets.

There has been a great deal of compromise in this process. I am very comfortable with some of the decisions we have arrived at while others, quite frankly, give me

pause. This item does not reflect a perfect solution, but then neither is this a perfect world nor a perfect process.

We are voting on this item before we have a draft reflecting the latest cuts. This is especially troubling to me on issues of this magnitude. The lights were burning brightly on the 8th floor last night, and offices reached some agreements on major issues at the 11th hour. I mean that literally; at 11 o'clock.

So we understand we haven't seen all the cuts and we haven't had a chance to review them in the detail I would like to, and I nowhere would like to suggest that the bureau hasn't done its job by not getting this done, given the process that it took to get here, but I am just uncomfortable voting on an item before all the offices have seen the order itself, given that, as my colleagues have indicated, the devil is often in the details.

So in this field I have learned that it is rare to find an answer that is wholly right or wholly wrong, and that's where the difficult issues lie. As such, I have decided in coming into this process that I would rely on some key principles to guide my deliberations.

First and foremost, my role is to implement the law as written by Congress, not my own policy preferences. In following the statute, it is imperative to come up with a solution that is legally sustainable, since the court is the final arbiter of whether a decision comports with the law.

This is the commission's third attempt to try and get the UNE process right, and hopefully we will learn that the third time is a charm, and not three strikes and you're out.

Second, the basic thrust of the Telecom Act is to promote competition. If a competitor is impaired without access to a network element, an incumbent is required to unbundle it until the impairment no longer exists, or is remedied.

Third, the act envisions deregulation in areas where competition has firmly taken hold. This is true for an impairment analysis. If impairments no longer remain, network elements no longer need to be unbundled. Deregulation follows competition under the act, not vice versa.

Fourth, the act envisions state commissions as our full partners in its implementation. In evaluating impairments, the states should put a key role in determining in a granular fashion where they remain and where they no longer exist, subject to clear guidance from the commission.

Finally, we are here to protect the public interest. The Telecom Act was ultimately written for consumers. It was meant to ensure that everyone has access to the best network in the world at reasonable rates.

After careful consideration and extensive consultation and work with my colleagues, I am confident that the switching and transport portion of this item is

faithful to all of these principles. Whether competitors are impaired without access to the UNE platform has fueled a lot of debate in this proceeding, as you know. Competitors say that without it, they will no longer be able to compete.

Many state commissioners say that they must have the opportunity to include the elements that make up the platform on a list of UNEs even if the commission determines not to include them. And many incumbents tell us that requiring them to provide the platform is a disincentive for investment.

Today we have tried to walk a fine line between all of these concerns. The act looks to the commission to balance the tension between the requirements to unbundle and the subsequent effect on investment by both incumbents and competitors. That is the balance that we strove to achieve in this item.

For example, the record indicates that a customer churn in the first three to six months of offering local telephone service to new customers causes an impairment unless UNE-P is available as an entry device.

I am therefore pleased that this order makes available a rolling UNE-P as an acquisition tool.

So we have worked hard to ensure that this item addresses the concerns of the D.C. Circuit in the USTA (phon.) case. The D.C. Circuit raised profound concerns

about national findings that were not reflective of the unique nature of some markets in geographical areas.

I firmly believe this product is faithful to the partnership created in the act between the Federal Communications Commission and state commissions by implementing the market-opening provisions of the act. And we have done so in a granular fashion that I think is impelled by the USTA court decision. We have done the best we could with the record before us.

Now on broadband, as I have said before, I believe that speeding deployment of broadband is one of the main goals of the Telecom Act. I support efforts to spur investment in broadband deployment.

For example, the portion of the item that does not require unbundling of fiber to-the-home loops for broadband new built -- for new builds may make a lot of sense, but I am concerned that other aspects of this integrated broadband package agreed upon late last night may well undermine the ability of competitors to drive deployment in the future as the network moves from copper to fiber.

I am simply not satisfied to rely on a rationale based on the potential existence of intermodal competition in the future. It is difficult to agree to such a major limitation on competitors' access to facilities that are needed to make broadband available to most American homes.

I will respectfully dissent on those provisions despite my belief that substantial relief is in order to spur investment in new broadband network infrastructure.

I commend the staff for the excellent work that you have done on this item and bringing together it and all of its complexities, and I must say that having this proceeding my first three months as a commissioner was quite a baptism by fire. I feel like I am ready for just about anything now.

Thank you, Mr. Chairman.

CHAIRMAN POWELL: Thank you. Don't be sure of it. [Laughter.]

I am somewhat humored as I look out on the faces in the room because if you are not confused yet, I don't know how you have made sense of what you have heard today. Hopefully the statements will provide some guidance on it, but this has been a complex proceeding, and I too feel obligated to start by offering a heartfelt thanks to the members of the bureau who sit at this table, and I think just as importantly those who aren't sitting at this table, who I have spent many hours for many days and many months working on this item.

I can tell you I have commanded army units, I have run divisions of the Federal government and private practice, and I have never worked with a harder-working, more sincere, more intellectually honest, rigorous, and

committed set of employees as the members of the Wireline Competition Bureau that are sitting at this table, and their colleagues who aren't, and I owe you a huge debt of gratitude, as do the people of the United States.

So thank you, Bill, Michelle, Tom, Brent, all the members of your team, for your hard work, Jeff, and Ian, who presented the item beautifully.

Today the commission concludes one of its most significant proceedings ever. The triennial review has been a complicated and difficult undertaking, but one that will set critical parameters for competition and broadband deployment for years to come.

There are some immensely important achievements in this order that have long been objectives of mine, namely, substantial broadband relief. Yet, regrettably, there are some fateful decisions as well, which I believe compromise some very important principles to which I adhere unwaveringly, and to those I must respectfully dissent.

I begin with the momentous step we took today to create a broadband regulatory regime that will stimulate and promote deployment of next-generation infrastructure, bringing a bevy of new services and applications to consumers.

I have long stated that broadband deployment is the most central communications policy objective of our day. Today we at last put some substance into that stated goal.

I am proud to say that today we take some vital steps across the desert from the analog world to the digital one. Today's decision makes significant strides to promote investment in advanced architecture and fiber by removing impeding unbundled obligations. The digital migration journey that I often speak of is one step further along.

I do, however, dissent from the majority's decision to immediately eliminate line-sharing as an unbundled network element. Most of our policies to promote the goals of the Telecom Act have produced lots of rhetoric but little yield today. However, line-sharing has clear and measurable benefits for consumers. It has unquestionably given birth to an improvement competitive band of broadband suppliers. That additional competition has directly contributed to lower prices for new broadband services.

By some estimates, 40 percent of DSL providers use line-shared inputs. The decision to kill off this element and replace it with a transition of higher and higher wholesale prices will lead quickly, I fear, to higher retail prices for broadband consumers at a time when we can ill afford it.

I also believe that the argument that removing line-sharing is a form of positive regulatory relief to stimulate broadband is completely ill conceived. Line-sharing rides on the old copper infrastructure, not on the

new advanced fiber networks that we are attempting to put into deployment.

Indeed, the continued availability of line-sharing and the competition that flowed from it likely would have pressured incumbents to deploy more advanced networks in order to move from the negative regulatory pole to the positive regulatory pole by deploying more fiber infrastructure. This decision actually diminishes the competitive pressures to do so.

Today we also issue a very important further notice on our pick-and-choose rule, and tentatively conclude that it should be eliminated.

I thank Commissioner Abernathy for her leadership on this important point. This is an important and underappreciated step. The pick-and-choose rule has in many ways undermined the goals of the act by squelching any incentive to reach commercially negotiated terms and conditions, which Congress hoped would eventually overtake the heavier-handed regulatory process for developing terms and conditions of commercial arrangements.

I look forward to completing that proceeding.

I now turn to the majority's decision on switching, which I cannot in good conscience support. In opening this proceeding, this commission committed itself to conduct a thorough review of its unbundling policies. This review took on greater importance in light of a slumping

telecommunications sector and the D.C. Circuit's USTA decision vacating the rules that unbundled each element of an incumbent's network.

Thus, the commission was charged with reconstructing its list of unbundled elements from the ground up. As we have endeavored to do so, the most controversial judgment rested with the switching element.

It is important to note that the importance of this element is not in this particular functionality, but that it represents the capstone of what has become known as the unbundled platform.

If switching is available, it is very likely a carrier can resell the entire incumbent's network at heavily subsidized rates set by regulators without having to provide much in the way of its own infrastructure.

The majority apparently is a big fan of UNE-P because it has contorted the letter and spirit of the statute and the court's interpretation of our responsibility in order to ensure its indefinite preservation.

What is remarkable to me about today's decision is that one looks in vain to find a clear or coherent Federal policy in the choices made by the majority. Consistently underlying my preferences in this area is a commitment to provide and promote and advance facilities-based competition that is meaningful and sustainable, and that will eventually achieve Congress's stated goal of reducing regulation.

I think the benefits of such a policy are straightforward. Facilities-based competition means a competitor can offer real differentiated service to consumers.

The switch is the brains of one's network, and to be without one is to be a competitor on life support, fed by a hostile host.

Facilities-based competitors own more of their network and control more of their costs, thereby the potential for real lower prices for consumers. Facilities-based competitors offer greater rewards for the U.S. economy, buying more equipment from other suppliers like Lucent, Corning, and NorTel (phon.) and creating more jobs, a central reason that the Communications Workers of America supports such a course.

And facilities providers can create vital redundant networks that can serve our Nation if other facilities are damaged by those hostile to our way of life.

Some on this very panel have talked glowingly about facilities-based competition, but when one reviews this order, one will ask where is the beef.

Today's decision clearly steps back from pro-facilities-based policy by favoring extensive regulatory management of incumbent networks to supply the competitive market.

More distressing than giving facilities providers the back of their hand, I see no meaningful Federal policy put in its place, other than vague and solicitous pronouncements about the states playing the lead role in making these determinations, and a commitment to competition no matter how anemic.

Congress demanded the commission not be so passive and demure when it vested it with responsibility for the unbundling regime.

I also dissent from the switching section of this order because I find a commission majority for the third time in seven years substituting its preferences for a heavily permissive unbundling regime for Congress's judgment that no element should be provided unless the commission can affirmatively conclude that a competitor is impaired without it.

The Supreme Court admonished the FCC that it had to put forth a meaningful limiting principle in making its decisions. The commission's second attempt at these rules also failed when the D.C. Circuit vacated the rules last summer.

The Court emphasized that the commission could not treat unbundling as an unqualified good and had to consider the social costs as well.

It also admonished that the standard employed and applied by the FCC had to demonstrate that a typical entrant

was effectively prohibited from entering the market due to barriers associated with the monopoly power of the incumbent and not just the typical start-up costs or costs naturally associated with entry.

I think today the majority flouts the D.C. Circuit mandate. The legal errors, to my mind, of today's decision are many and numerous. But I will highlight some of the most egregious.

First, the majority places switching on the list without making an affirmative finding of impairment based on a thorough analysis of sufficiently granular criteria. Cleverly, they state only a presumption that that is impairment that can be subsequently addressed by state commission proceedings to either defeat the presumption and take switching off the list, or affirm it and leave switching on the list.

Remarkably, however, the national rule requires the switching element on little more than a presumptive intuition and even fails to truly apply the commission's own articulated impairment standard in doing so.

I simply believe this to be reversible error.

Moreover, the majority delegates its own responsibilities under the statute to the states, but fails to invoke any meaningful limiting principle in doing so. States are free to add or subtract elements largely at will.

The majority does provide a laundry list of microeconomic criteria that a state may consider, but the list is not exhaustive and states are free at bottom to do what they choose.

Furthermore, state decisions are unreviewable by this commission.

This order is legally suspect if for no other reason that it is nearly identical at its core to the ill-fated UNE remand order of 1999. In substance and in spirit it endeavors again to reverse the presumptions of the statute by treating unbundled switching as an unqualified good that should be provided by an incumbent to an entrant unless somehow the incumbent proves that the presumption of impairment is unwarranted.

I think this basic paradigm turns the statute on its head, and flies directly in the face of the Court's ruling.

Furthermore, I believe this decision will prove too chaotic for an already fragile telecom sector. In choosing to abdicate its responsibilities to craft clear and sustainable rules on unbundling to the state public utility commissions, it has brought forth a molten morass of regulatory activity that may very well wilt any lingering investment interest in this sector.

And I fear as much or more for CLECs as I do ILECs for the prolonged uncertainty of rights and responsibilities may prove stifling.

The Nation now will embark on 51 major state proceedings to evaluate what elements to be unbundled and make available. These decisions will be litigated through 51 different Federal District Courts of the United States. These 51 cases will likely be decided in multiple ways; some upholding the state, some overturning the state, and little chance of regulatory and legal harmony among them at the end of the day.

These 51 District Court cases are likely to be heard by 12 different Federal Courts of Appeals. We expect they will all rule similarly. And if not, we will eventually, years from now, be back in the United States Supreme Court to resolve any conflicts.

Yes, the same Court that vacated our excessively permissive regime in 1999.

This process will take many years and will hardly be the quieting and stabilizing regime that was so craved by a rocky market.

I also believe that under this decision there will be other negative consequences for the economy. I fear we will see more job losses as carriers cut their capital expenditures and refuse to move forward with new investment and growth against this Picassoesque regulatory backdrop.

I can only imagine how a business plan gets written by a CLEC hoping to enter a local market not knowing now and not likely to know for years what they are ultimately entitled to and for how long.

I also believe this decision could prove quite harmful to consumers in the long run, and I cringe to see their welfare raised on the staff of the majority's decision. Make no mistake, UNE-P may have very limited merits as a transitional strategy, but it is fatally flawed as sustainable local competition. This is not the low-lying plateau on which the high aspirations of the 1996 Act should be planted.

It is a model that only works if hundreds of stars align perfectly and stay that way. Every state needs to continue to make every last element available. Every decision to do so must be sustained by every court that examines it. The FCC must somehow never tamper with it, and Congress better not even alter the rights.

The regulatory arbitrage bubble expands ever more perilously with each regulatory variable and, in my view, is eventually going to pop like dot coms of old if government policy does not diligently steer the balloon to stable ground.

To explain their decision, the majority has cloaked itself in the drape of states' rights. A classic conservative mantra.

Let me stop for a second.

Do you all have the rest of my statement?

I was on a roll, too.

[Laughter.]

CHAIRMAN POWELL: I don't have the last page of it. [Laughter.]

Thank you. To explain the decision, the majority has cloaked itself in the drape of states' rights. A classic conservative mantra not generally associated with a majority of Democrats. This is a trivial misuse of a cherished constitutional precept. Congress has established a Federal statute and Federal policy to promote competition. Even the majority concedes that it is delegating Federal authority to state officers and not intruding on the general police powers of a state that normally comprise its constitutional rights.

Justice Antonin Scalia, whose credentials seem unchallenged as a leading voice for states' rights, himself eloquently quashed this peccadillo in Iowa Utilities. It's worth repeating his words.

"The question in these cases is not whether the Federal government has taken the regulation of local telecommunications competition away from the states. With regard to matters addressed by the '96 Act, it unquestionably has. The question is whether the state commissions, in the administration of the new Federal

regime, is to be guided by Federal agency regulations. If there is any presumption applicable to this question, it should arise from the fact that a Federal program administered by 50 independent state agencies is surpassingly strange. This is at bottom," he says, "a debate not about whether the states will be allowed to do their own thing, but about whether it will be the FCC or the Federal courts that draw the lines to which they must hew. To be sure, the FCC lines can be even more restrictive than those drawn by the courts, but it is hard to spark a passionate states' rights debate over the detail."

I simply could not agree more.

I emphasize, however, that I do see the implementation of this statute as a state-Federal partnership. States are given control over the rates set for unbundled elements, but it is principally the obligation of the FCC to determine what those elements will be, faithfully implementing impairment clause. States can assist in that effort, but our responsibilities should not be released to them.

I must also note that the impulse to leave much more telecom policy to state commissions may run against the winds of technological changes. Communications is converging. Distance is fading as a meaningful construct in an Internet, cyber space world, and mobility is ascending. These are the circumstances that necessitate at a minimum a

coherent national framework of rules. States can and will play important roles in such a regime, but I am of the view that primacy must rest with the national government.

There are great strides being made in the march of digital migration today which realize some of my important objectives. I am disappointed, however, by today's decision on UNE-P.

Nevertheless, it is the fair result of a democratic institution in which the majority rules.

I also recognize that state PUCs will now have an enormous task before them, and I honestly and sincerely wish them the very best as they struggle through what the FCC could not.

I pledge to work with them in partnership, to yield the best result for the Nation, and I sincerely hope that those carriers who have sought so fiercely for this result will now prove their value in the marketplace and actually deliver the local complaint, lower prices, and more innovative services that they have insisted would prevail every night on my television screen.

[Laughter.]

CHAIRMAN POWELL: I for one will keep watching.

This has been a tough proceeding, but I look forward to getting it behind us and moving to other matters pressing for the commission's attention.

Thank you.

With that, I would like to call the vote on this item, and I think because of its complexity, I might ask each member to note what specifically it may be dissenting or concurring to, if that is okay.

Commissioner Abernathy.

COMMISSIONER ABERNATHY: I will be dissenting to two parts of the order, the switching piece, as well as the piece on line-sharing. I will be dissenting to that piece, too.

CHAIRMAN POWELL: Thank you.

Commissioner Copp.

COMMISSIONER COPP: I would be approving in part, concurring in part, and dissenting in part on the decision.

CHAIRMAN POWELL: Do you want to share which parts you will be dissenting to?

COMMISSIONER COPP: I will be approving on the switching part and the transport part, and dissenting on the broadband part.

CHAIRMAN POWELL: Thank you.

Commissioner Martin.

COMMISSIONER MARTIN: I will be approving on both the switching and on the broadband pieces.

CHAIRMAN POWELL: Commissioner Adelstein?

COMMISSIONER ADELSTEIN: I am approving on the switching and transport and dissenting on part of the broadband.

CHAIRMAN POWELL: Thank you.

And I am approving except for dissenting to the switching element and the line-sharing element.

With that, and along those lines, the commission has adopted the item. You will desperately need editorial privileges and those are --

[Laughter.]

CHAIRMAN POWELL: -- those are certainly conferred on you.

Thank you.

Madam Secretary, can you please announce the next meeting.

THE SECRETARY: The next agenda meeting of the Federal Communications Commission will be Thursday, March 13th, 2003.

CHAIRMAN POWELL: Thank you very much.

That concludes this meeting.

[Whereupon, the meeting was adjourned.]

ATTACHMENT B

EX PARTE CONTACTS (CC DKT. NO. 01-338) AFTER THE SUNSHINE NOTICE (FEB. 13, 2003) AND BEFORE RELEASE OF ORDER (AUG. 21, 2003)

Date(s) of Contact	Party	Summary	FCC Staff Present
02/14/03	Nebraska Public Service Commission, Anne Boyle	Letter submitted requesting state jurisdiction over UNE-P.	Letter sent to Commissioner Adelstein
02/14/03	Broadview Networks, Inc.	Letter submitted providing further information on competitive carriers' need for access to unbundled dedicated transport from ILECs. The letter addresses concerns with application of "self-provisioned" transport.	NA
02/14/03	AT&T	Clarified evidence related to the proceeding, including AT&T's position on the necessity of the unbundling of switching until economic impairments are addressed, as well as other issues on the record.	Jordan Goldstein
02/16/03, 02/18/03	AT&T	Spoke on the telephone, reiterating AT&T's position on the necessity of requiring the unbundling switching until significant economic impairments are addressed and eliminated.	Dan Gonzalez
02/19/03	Z-Tel	Responded to request to answer whether carriers seeking to serve the mass market are impaired without unbundled switching.	Dan Gonzalez
02/19/03	Allegiance Telecom, Inc.	Explained that an FCC rule that has the effect of denying competitors unbundled access to ILEC broadband loops would destroy facilities-based competition in broadband, as well as ways to reduce anti-competitive consequences.	Jordan Goldstein

EX PARTE CONTACTS (CC DKT. NO. 01-338) AFTER THE SUNSHINE NOTICE (FEB. 13, 2003) AND BEFORE RELEASE OF ORDER (AUG. 21, 2003)

Date(s) of Contact	Party	Summary	FCC Staff Present
02/21/03	Covad	Made a presentation in response to questions posed regarding the transitional mechanisms applicable to the Commission's disposition of the line sharing UNE. Covad also asked the Commission to clarify in the Order that line splitting was preserved.	Commissioner Martin and Dan Gonzalez
02/25/03	Covad	Separate oral statements made in response to specific question regarding the proper framework for the Commission's disposition of the line sharing UNE. Covad encouraged the FCC to reconsider the announced line sharing UNE phase-out, or in the alternative for the Commission to clarify in its order that it is providing a specific state role for implementation of their decision.	Jordan Goldstein Lisa Zaina Dan Gonzalez
02/28/03	McAllen Hispanic Chamber of Commerce	Letter submitted requesting regulatory relief for the local Bell company, SBC.	NA
03/14/03	AT&T	Reviewed AT&T's position in the Wireline Broadband proceeding in light of UNE proceeding.	Wireline Competition Bureau Staff
03/14/03	Verizon	Responded to questions concerning interconnection change of law provisions.	Matthew Brill
03/18/03	Verizon	Responded to questions concerning interconnection change of law provisions.	Chris Libertelli
03/31/03	Covad	Meeting was held to discuss Covad's 02/24/03 and 02/25/03 *ex parte* submissions.	Commissioner Martin and Dan Gonzalez
04/03/03	Verizon	Responded to questions concerning interconnection change of law provisions.	Dan Gonzalez

EX PARTE CONTACTS (CC DKT. NO. 01-338) AFTER THE SUNSHINE NOTICE (FEB. 13, 2003) AND BEFORE RELEASE OF ORDER (AUG. 21, 2003)

Date(s) of Contact	Party	Summary	FCC Staff Present
04/11/03	BellSouth	Conference call to respond to questions concerning change of law provisions in BellSouth's interconnection agreements.	Dan Gonzalez
04/16/03	NewSouth	Responded to questions concerning change of law provisions in implementing the order.	Dan Gonzalez
04/17/03	Covad	Meeting was held to discuss Covad's 02/24/03 and 02/5/03 *ex parte* submissions.	Commissioner Martin and Dan Gonzalez
04/30/03	Association for Local Telecommunications Services	Submitted copies of panelist handouts that addressed issues considered in the docket from the ALTS annual conference. Also submitted audio feed of the conference.	NA
05/01/03	Covad	Responded to request and discussed Covad's 02/24/03 and 02/25/03 *ex parte* filings	Commissioner Martin and Emily Willeford
05/01/03	Covad	Responded to request and discussed Covad's 02/24/03 and 02/25/03 *ex parte* filings and discussion.	Lisa Zaina
05/05/03	Association for Local Telecommunications Services	Submitted transcription of the discussions addressing issues considered in this docket from the ALTS annual conference.	NA
05/05/03	Corning	Submitted letter to Commissioner Martin and staff regarding definitions for dark fiber, fiber-to-the-home, and other fiber-related topics.	NA
05/19/03	Verizon	Responded to Covad's proposals to reconsider or modify the Commission's decision with respect to line sharing. Letter submitted details reasons not to retain line sharing.	Commissioner Martin and staff

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

24 February 2003

Re: *Triennial Review Proceeding*, WCB Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On Friday, February 21, 2003, the undersigned, on behalf of Covad Communications Company, together with Charles E. Hoffman, President and CEO, Brad M. Sonnenberg, General Counsel, and Praveen Goyal, Senior Counsel, made an *ex parte* presentation to Commissioner Kevin Martin and Dan Gonzalez, Legal Advisor, in the above-referenced proceeding. The presentation was in response to a specific question posed by Mr. Gonzalez regarding the transitional mechanisms applicable to the Commission's disposition of the linesharing UNE. In the course of the presentation, Covad also asked for clarification from the Commission in the Triennial Review Order that linesplitting was expressly preserved.

The attached memorandum reflects the content of that presentation.

Respectfully submitted,

/s/ Jason Oxman

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Transitional Mechanisms to Apply if Linesharing is Removed as UNE

(1) Refrain from Prospective Preemption of State Law

- The first principle set forth by NARUC in its UNE framework was no state preemption. States should not be preempted from acting under independent market-opening laws at the state level. Existing state action under independent state authority should not be disturbed. To the extent that states act after the Triennial Review Order in ways that actually conflict with the Commission's unbundling rules, the Commission can always entertain preemption petitions addressing those particular situations.

(2) Grandfathering of Existing Lines

- During the period following the elimination of the linesharing UNE in any area, consumers who subscribed to CLEC DSL services should not be subjected to an FCC-mandated increase in prices over what they expected to pay (and, indeed, contracted to pay) when they subscribed. Should linesharing be eliminated in any area, existing customers (i.e. those customers who contracted for service before the linesharing UNE was eliminated) should be grandfathered at the prices they contracted to pay, and the FCC should not interfere with those contracted rates. These existing broadband customers should be grandfathered until service disconnection.

- Due to the normal processes of customer attrition and churn, Covad expects that most of its existing line shared lines in service may no longer be in service over the course of three years. Grandfathering merely allows consumers who relied on the availability of competitive broadband services to continue to rely on the arrangements they have already purchased.

(3) Transition to permit sufficient time for linesharing rate negotiations with ILECs

- In areas where linesharing is eliminated as a UNE, CLECs will have to negotiate new contractual terms and conditions with ILECs. This process will take time, and CLECs cannot enter those negotiations without the ability to maintain customer confidence during the negotiation period. Therefore, for the first year after linesharing is eliminated as a UNE in any area, current pricing, terms and conditions for the line sharing UNE should continue to apply in that area. This enables Covad to continue its day-to-day operations processing and fulfilling current order volumes, while it works over that year to preserve access arrangements with the ILECs.

- The Commission could require that, if CLECs enter into a linesharing pricing agreement during that first year of transition, the newly contracted rates would apply to all new linesharing customers as soon as such an agreement becomes effective.

- New customers contracting for service during this one year transition would be entitled to the grandfathered rate for only one year, after which time the new, non-UNE rate would apply.

(4) Creation of an Interstate Line Sharing Service

- In areas where the Commission determines that competitors are not impaired without access to the line sharing UNE, and the linesharing UNE is subsequently eliminated, incumbent LECs should be required to continue providing access to the high-frequency portion of the loop as a mandatory interstate telecommunications service. This mechanism is necessary to avoid cutting CLEC DSL providers off from providing residential service altogether.

- Without an ILEC requirement to provide line sharing in some form, Covad is left with little effective bargaining power with the incumbent LECs in negotiating line sharing access arrangements. The availability of an interstate line sharing service would at least provide Covad with some recourse to the FCC in the face of unreasonable ILEC negotiating positions. If the Commission wants to move Covad to negotiated line sharing pricing, it should provide Covad with the tools it needs to actually negotiate access.

- Until its tariff for such a line sharing service goes into effect, no incumbent LEC would be permitted to refrain from providing access to the high-frequency portion of the loop under the terms of its current interconnection agreements.

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

25 February 2003

Re: Triennial Review Proceeding, WCB Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch,

On Tuesday, February 25, 2003, the undersigned, on behalf of Covad Communications Company, made separate oral *ex parte* presentations to Jordan Goldstein, Lisa Zaina, and Dan Gonzalez, in response to specific questions from each of them regarding the proper framework for the Commission's disposition of the linesharing UNE. The substance of those presentations is reflected below.

At the outset, Covad strongly encouraged the FCC to issue a *sua sponte* reconsideration[1] of the announced linesharing UNE phaseout. Based upon recent public statements by the Bell companies[2], the FCC's decision to eliminate linesharing in the name of promoting investment incentives appears to have been a grave and unnecessary error. Given the strong reservations expressed by two of the three commissioners who voted to eliminate linesharing[3], the Bells' public statements strongly validate those expressions of concern. Rather than celebrate the linesharing relief granted by the Commission, the Bells have chosen to excoriate those who gave it to them. The Commission should not punish broadband consumers and threaten nationwide broadband deployment by eliminating linesharing in order to give the Bell companies something they clearly do not want.

In the alternative, Covad encouraged the Commission to clarify in its order that it is providing a specific state role for implementation of the FCC's linesharing UNE decision. That state role would, logically, track the state role regarding disposition of the

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[1] "The Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action . . . ." 47 CFR § 1.108. In other words, at any time from the date of the open meeting adopting the Triennial Review item until 30 days after the date of publication of that item in the Triennial Review, a majority of the Commission may reconsider its linesharing UNE ruling.

[2] *See, e.g.*, "Despite Winning Ruling, Bells Shirk DSL Investment Pledge," A1, Wall Street Journal, February 21, 2003.

[3] *See, e.g.*, Statement of Commissioner Michael Copps, WCB Docket Nos. 01-338, 96-98, 98-147, February 20, 2003 ("There are aspects of this Order that are certainly not my preferred approach, but which I have had to accept in order to reach compromise. In particular, there is the decision to eliminate access to only part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. I believe that line sharing has made a contribution to the competitive landscape. Instead of recognizing this contribution and encouraging it, we provide today only an extended transition period to allow competitors to purchase the entire loop facility as a network element, or to pair with a voice provider, to offer the full range of services to a customer.")

switching UNE. The Commission apparently has based its linesharing framework on implementation of the D.C. Circuit decision in *USTA v. FCC*, which requires the FCC to examine the effect of the presence of cable modem services. In applying this framework, the FCC would make no conclusions as to the competitive impact of cable modem availability that would bind it in further proceedings, but rather would base this conclusion solely on the cable modem language in *USTA*.

Logically, where cable modem is not deployed in the same geographic area as ILEC DSL, existing linesharing UNE rules would be maintained. Where cable modem is deployed in the same geographic area as ILEC DSL, the Commission would establish a rebuttable presumption that the linesharing UNE would be phased out and replaced by a linesharing interstate service, pursuant to sections 201/202 of the Act. In addition, where cable modem and ILEC DSL are both available (as determined by a state commission), the state commission may rebut the federal presumption against impairment by concluding that, based on state-specific conditions, competitors are impaired without access to the linesharing UNE. That conclusion must be based on the state commission's fact-specific analysis of the actual availability of alternatives to linesharing, such as stand-alone unbundled loops. Factors to be analyzed would include ILEC performance on timely stand-alone loop delivery, cost of stand-alone loop installation, and other operational and financial impairments.

If the state commission does not rebut the presumption against impairment, the linesharing UNE will be phased out, and existing linesharing UNE terms, conditions, and prices will remain available until the effective date of the ILEC interstate tariff. In addition, the FCC's stated three-year transition period will apply. States that have independent authority to adopt market-opening rules would not be disturbed in their ability to do so.

Respectfully submitted,

/s/ Jason Oxman

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May 19, 2003

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *UNE Triennial Review Proceeding*, WCB Docket Nos. 01-338, 96-98, 98-147.

Dear Ms. Dortch:

On May 16, 2003, Michael Glover and I representing Verizon met with Commissioner Martin, Dan Gonzalez and Emily Willeford from Commissioner Martin's office. In response to a question from Commissioner Martin, the Verizon representatives responded to Covad's recent proposals to reconsider or modify the Commission's decision with respect to line sharing.[1]

1. Covad's arguments continue to rest on the mistaken premises that line sharing has a significant impact on broadband competition; that the end of line sharing will result in higher broadband prices for consumers and/or reduced broadband deployment by ILECs; and that CLECs lack alternatives to line sharing.

a. Line sharing is not and has never been a significant competitive factor in the marketplace, and it accounts for only a tiny fraction of the broadband market. According to the Commission's most recent report on high-speed Internet access, ADSL service provided by CLECs represents approximately 1.5% of mass-market broadband connections (which the Commission defines as including residence and small business customers).[2] ADSL is the relevant product, of course, because line sharing is technically capable of providing only asymmetric services. As of year-end 2002, in the Verizon-East territory (i.e., the former Bell Atlantic region) – which accounts for the vast majority of the line sharing that is used in Verizon's service areas – CLECs used line sharing to serve only about 20% of their ADSL

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1 *See generally* Ex Parte filings by Covad Communications Co., WCB Docket Nos. 01-338 et al. (FCC filed Feb. 24, 2003; Feb. 25, 2003; and May 2, 2003).

2 *See High Speed Services for Internet Access*, Report, Table 3 (ADSL share of mass market) & Table 5 (ILEC/CLEC market shares) (WCB rel. Dec. 17, 2002).

customers. These customers typically are residences or smaller businesses, since many smaller businesses use symmetrical DSL products which require an unbundled loop, and larger businesses generally use other services such as ATM or Frame Relay. Applying this 20% use factor to the 1.5% CLEC share of the mass market indicates that line sharing represents only approximately 0.3% of the broadband mass market. Even if the share of CLEC customers served via line sharing in other parts of the country were double or even triple the 20% that Verizon has documented in its region, line sharing would still account for substantially less than 1% of the market.

The real competition in the broadband market is intermodal competition, and cable remains the overwhelmingly dominant provider of broadband to the mass market with approximately 65 percent of mass-market subscribers according to the Commission's most recent report.[3] Other intermodal competitors in the market include satellite, terrestrial wireless, Wi-Fi and other platforms, and still other platforms such as broadband over power lines are now emerging. Under these circumstances, there simply is no plausible basis for finding impairment of competition in the broadband market, which is the statutory prerequisite to requiring line sharing under section 251(d)(2) of the Act. Indeed, imposing asymmetrical unbundling requirements on incumbents would thwart, rather than promote, competition by impeding their attempts to challenge the cable modem providers that dominate the market.

b. Likewise, there is no merit to the claim that eliminating line sharing will result in higher broadband prices. Even with the benefit of near-free line sharing, Covad has not been a significant price cutter. Covad's lowest price residential service (384 kbps downstream and 128 upstream) is $39.95 per month. See http://www.covad.com/residential/telesurferlink/ (visited May 18, 2003). By contrast, in light of the Commission's announced decision to eliminate line sharing, Verizon has significantly reduced its DSL rates. Verizon reduced its tariffed DSL rates (1.5 Mbps downstream and 128 kbps upstream) to as little as $26.95 (from $33.95) for customers willing to purchase larger volumes, and to only $28.95 (from $38.95) for customers with the smallest volume commitment (which also was reduced to only 1,000 lines at the end of 5 years). Moreover, Verizon also cut the prices for its own high-speed Internet access service that relies on DSL by up to 30 percent, to $34.95 per month from $49.95, and to $29.95 when ordered with a bundle of other services. These market-leading low prices reflect both reliance on the significant relief announced in the Commission's public notice and the fact that the real competition comes from cable and other technology platforms and not from line sharing. Accordingly, the business press has not reported any imminent price increase from the end of line sharing but instead a new "price war between telecommunications and cable companies as they fight for broadband customers."[4]

c. Nor is there any merit to the claim that line sharing stimulates broadband deployment by ILECs. As noted above, line sharing accounts for only a minimal number of broadband lines.

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[3] *Id*., Table 3.

[4] A. Latour and P. Grant, *Verizon May Set Off Price War* at B2, Wall Street Journal (May 5, 2003).

But following the Commission's decision to eliminate line sharing, Verizon has announced that it intends to expand its broadband deployment (presuming the rules are as described in the summary released to date). For example, Verizon has announced that it will extend its DSL deployment to reach approximately 80 percent of its customers by the end of this year alone. Verizon also has announced that, to make its service more attractive in competition with cable modem service and other competitors, it has begun to enhance its high speed Internet access service by providing Wi-Fi access in hot spots beginning in New York City.

d. The suggestion that CLECs lack alternatives to line sharing also is false. For example, as noted above, some 80% of CLEC DSL in the Verizon-East region already operates over stand-alone copper loops. Such loops are readily available to CLECs nationwide. The Commission has already confirmed the requisite availability of unbundled copper loops in the 42 states (representing 80% of the U.S. population) in which it has allowed Bell companies to provide long-distance service pursuant to § 271 of the Act. The voluminous record in the present proceedings provides no basis for supposing that such loops are any less available in the remaining states.

Covad's own CEO Charles Hoffman recently admitted that alternatives to line sharing are available, including the option of providing data services over an unbundled copper loop while partnering with another CLEC that would provide voice services over the same loop in a so-called "line splitting" arrangement: "We already have line-splitting trials underway with AT&T, with launch mere months away, and are working with other partners to expand voice and data offerings."[5] He added, "We are confident that Covad's business plan can be adjusted if necessary to absorb the FCC's changes while allowing us to continue running a nationwide network."[6] Most recently, Covad has announced a similar partnership with Z-Tel.[7]

Covad also has stated publicly that CLECs would be better off with less, rather than more, regulation of the transition away from line sharing. According to Mr. Hoffman, "the market is really the best place for all that to work out, and if the FCC would get out of the way we could all just do deals together."[8]

2. The Commission's planned three-year phase-out of line sharing for existing customers already is longer than necessary for CLECs to transition these customers to other arrangements and to protect against customer disruptions. Covad's arguments that more time is needed and that states should be allowed to override the Commission's decision to phase-out line sharing are simply untenable.

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5 J. Curran, *Covad in Talks on Line-Splitting With Competitive Voice Providers*, TR Daily (Mar. 12, 2003).

6 *Id.*

7 Z-Tel Technologies, Inc., Press Release, New Agreement With Covad Allows Z-Tel to Deliver Broadband Services to Its Telecom Customers (May 15, 2003).

8 J.Curran, *Covad CEO: Line Sharing Portion of FCC Order May Be Softened*, TR Daily (May 7, 2003).

a. If, as Covad has proposed, states were allowed to override this Commission's determinations regarding broadband unbundling (including whether line sharing is required), all of the Commission's efforts to remove regulatory hurdles to broadband investment and deployment in this and other dockets would be for naught. A patchwork of mutually contradictory state broadband regulations would raise costs, skew competition, deter investment, and inhibit the operation of market forces in an area critical to the health of the nation's economy.

Nor is the prospect of state regulation in this area merely hypothetical. Since the Commission announced the end of line sharing, states have continued in their attempts to regulate DSL and related services. For instance, an Administrative Law Judge of the Pennsylvania Public Utility Commission recently issued a recommended decision pursuant to which Verizon will be obligated to offer certain DSL equipment and provide an end-to end broadband service for CLECs over hybrid fiber/copper loops on an unbundled basis at TELRIC prices.[9]

Consequently, the Commission should affirm its announced conclusion that there is no competitive impairment in the broadband market, and make clear that state commissions cannot override this determination by imposing unbundling obligations for broadband. Any other result would jeopardize the Commission's broadband policy objectives.

b. Covad's other proposed "transition mechanisms" are equally misguided. First, the suggestion that ILECs should be required to continue providing access to the high-frequency portion of the loop as a price-regulated "mandatory interstate telecommunications service" is an obvious attempt to continue line-sharing indefinitely despite the lack of any impairment to competition. Rather than imposing new regulatory requirements on broadband, the Commission instead should be pressing ahead with its other broadband proceedings to remove existing requirements so that broadband can develop in a free market. As noted above, Covad itself has stated that CLECs would be better off "if the FCC would get out of the way." In any event, the Commission is foreclosed from creating such a new service here because the rulemaking notice in this docket sought comment only on the obligation to provide UNEs and not on the merits of imposing some new obligation to provide entirely new telecommunications services.

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[9] *Verizon Pennsylvania Inc. Petition and Plan for Alternative Form of Regulation Under Chapter 30; 2000 Biennial Update to Network Modernization Plan*, Recommended Decision at 70-77, Docket No. P-00930715F0002 (Penn. PUC rel. Mar. 24, 2003).

Second, the Commission should likewise reject Covad's suggestion to "grandfather" line sharing at current TELRIC rates in perpetuity for customers who currently are served using line sharing. The current three-year transition period for existing customers is already too long and, depending on the final rules, could keep copper plant in place where ILECs would prefer to deploy advanced fiber. And the Commission lacks authority to "grandfather" current customers at TELRIC rates forever as Covad wishes, given that line sharing does not meet the statutory impairment standard and is not an unbundled network element.

For all these reasons, the Commission should reject Covad's proposals.

Sincerely,

Susanne Guyer

cc: Commissioner Martin
D. Gonzalez
E. Willeford